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# Trade and Culture: Keep the Border Fuzzy, Please

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## ABSTRACT

The relationship between trade and culture can be singled-out and deservedly labelled as unique in the discussion of 'trade and ...' issues. The reasons for this exceptional quality lie in the intensity of the relationship, which is indeed most often framed as 'trade versus culture' and has been a significant stumbling block, especially as audiovisual services are concerned, in the Uruguay Round and in the subsequent developments. The second specificity of the relationship is that the international community has organised its efforts in a rather effective manner to offset the lack of satisfying solutions within the framework of the WTO. The legally binding UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is a clear sign of the potency of the international endeavour, on the one hand, and of the (almost desperate) desire to contest the existing WTO norms in the field of trade and culture, on the other. A third distinctive characteristic of the pair 'trade and culture', which is rarely mentioned and blissfully ignored in any Geneva or Paris talks, is that while the pro-trade and pro-culture opponents have been digging deeper in their respective trenches, the environment where trade and cultural issues are to be regulated has radically changed. The emergence and spread of digital technologies have modified profoundly the conditions for cultural content creation, distribution and access, and rendered some of the associated market failures obsolete, thus mitigating to a substantial degree the 'clash' nature of trade and culture.

Against this backdrop, the present paper analyses in a finer-grained manner the move from 'trade and culture' towards 'trade versus culture'. It argues that both the domain of trade and that of culture have suffered from the aspirations to draw clearer lines between the WTO and other trade-related issues, charging the conflict to an extent that leaves few opportunities for practical solutions, which in an advanced digital setting would have been feasible.

## KEY WORDS

Trade, culture, cultural diversity, the WTO, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, audiovisual media services, digital media.

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## 1. Introduction

The 'trade and culture' debate can be singled-out and deservedly labelled as unique in comparison to other 'trade and ...' issues. The reasons for this exceptional quality lie first in the intensity of the relationship, which is indeed most often framed as 'trade *versus* culture' and second, and as a consequence of this deepening discord, because the international community has organised its efforts in an effective manner to offset the lack of satisfying solutions within the framework of the World Trade Organization (WTO). In this second aspect, the 'trade *versus* culture' discourse has also received a clear institutional dimension,<sup>1</sup> in which the endeavours within the WTO are opposed to by those taken under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

It is the purpose of the present paper to look into this intensified institutional, policy- and decision-making disconnect between issues of trade and culture and to expose its flaws and the considerable drawbacks that it brings with it. These drawbacks, we shall argue, become particularly pronounced in the digital networked environment, which has impacted upon both the conditions of trade with cultural products and services (of which audiovisual media have been the

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<sup>1</sup> The choice of law and choice of forum on the horizontal plane are a leading issue in the 'trade and ...' debate. See Joel P. Trachtman, 'Transcending 'Trade and ...': An Institutional Perspective', Discussion Draft, 29 May 2001, at Abstract.

most contentious in the 'trade and culture' predicament) and upon the diversity of cultural expressions in local and global contexts. In this modified setting, there could have been a number of feasible 'trade *and* culture' solutions – i.e., regulatory frameworks (or combinations of such) that while enhancing trade liberalisation are also conducive to cultural policy measures. Yet, the realisation of any of these options becomes chimerical as the line between trade and culture matters is drawn in a clear and resolute manner. It would have been better if the borderline had remained fuzzy and some less comprehensive, more localised (in the sense of thematic scope and level of governance) solutions were sought to address distinct problems.

To explicate the above hypothesis, the paper's arguments are structured in four sections. The first one investigates closely the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as a culmination of the efforts to resolve cultural matters outside the WTO. It examines in particular the rights and obligations it formulates for the State Parties, and tests in the specific context of 'trade and culture' whether the international community has with the Convention succeeded in putting in place an appropriate and working instrument. Building upon this analysis, the second section seeks to expose the increasing disconnect between the issues of trade and culture at the international level and critiques it. Section three goes back to law of the WTO in order to see whether indeed the devil is so black as it is painted in the debates outside the trade forum, or whether there is room for practical solutions, in particular taking into account the changed landscape of contemporary media. Ultimately, section four pulls all analytical strings together, offering conclusions and some thoughts on possible escape routes leading out of the 'trade *versus* culture' quandary.

## 2. The UNESCO Convention: An Appraisal in Context

The Convention on Cultural Diversity was adopted by the 33rd UNESCO General Conference in 2005 and entered into force on 18 March 2007 after an incredibly swift ratification process.<sup>2</sup> It is the pinnacle of multiple-track efforts that spread over many years<sup>3</sup> with the objective of providing a binding instrument for the protection and promotion of cultural diversity at the international level. The Convention is thus on the one hand a crystallisation of some previous, mostly exhortatory acts<sup>4</sup> in the fields of culture and trade,<sup>5</sup> and of cultural heritage.<sup>6</sup> On

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<sup>2</sup> 148 countries voted for the adoption of the Convention, while four countries (Australia, Honduras, Nicaragua and Liberia) abstained. Only two countries, the US and Israel, opposed. As of 22 October 2008, 93 countries had ratified the UNESCO Convention, as well as the European Community (see <http://portal.unesco.org/la/convention.asp?KO=31038&language=E>; last accessed 25 January 2009).

<sup>3</sup> See Ivan Bernier, 'A UNESCO International Convention on Cultural Diversity' in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Zurich: Schulthess, 2004, pp. 65-76; Americo Beviglia-Zampetti, 'WTO Rules in the Audio-Visual Sector' in Paulo Guerrieri, P. Lelio Iapadre and Georg Koopmann (eds.), *Cultural Diversity and International Economic Integration: The Global Governance of the Audio-Visual Sector*, Cheltenham, UK: Edward Elgar, 2005, pp. 261-284; Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) *International and Comparative Law Quarterly* 55:3, pp. 635-652; Tania Voon, *Cultural Products and the World Trade Organization*, Cambridge: Cambridge University Press, 2007, at pp. 173-216.

<sup>4</sup> Rachael Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?' (2007) *International Journal of Communication* 1, pp. 24-55, at pp. 28-29.

<sup>5</sup> See UNESCO, Agreement on the Importation of Educational, Scientific and Cultural Materials, done at Florence, 17 June 1950 ('Florence Agreement'). The Agreement was updated with the Nairobi Protocol (done at Nairobi, 26 November 1976). More recent acts are the Council of Europe Declaration on Cultural Diversity,

the other hand and more importantly in the present context, the Convention is also a clear reaction to economic globalisation,<sup>7</sup> whose advancement has been significantly furthered by the emergence of enforceable multilateral trade rules and whose bearer, the WTO, has been perceived as the very antipode to 'culture'. In this sense, the UNESCO Convention as a legally binding agreement was meant to counterbalance the WTO and fill 'a lacuna in public international law regarding cultural values'.<sup>8</sup>

In both of the above aspects, the UNESCO Convention is said to be a remarkable success for those state and non-state actors, who can be collectively referred to as proponents of the 'cultural exception' doctrine<sup>9</sup> and who have fervently for many years now argued that cultural products are not just commodities but 'reflect who we are as a people, [...] shape our society, develop our understanding of one another and give us a sense of pride in who we are as a nation'.<sup>10</sup> Beyond this rhetoric, however, the odd thing about the Convention is that when one looks at it closely and construes it as a treaty basis for any future undertaking aimed at protecting and promoting cultural diversity, most of the highly optimistic labels that cultural advocates put to it simply do not stick. In the following, we briefly<sup>11</sup> look into some of the Convention's defects and evaluate whether their gravity is such that it renders the entire instrument of little use, and what this may mean for the relationship between trade and culture.

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done at Strasbourg, 7 December 2000 and the UNESCO Universal Declaration on Cultural Diversity, done at Paris, 2 November 2001.

<sup>6</sup> See e.g. UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, done at Paris, 16 November 1972; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, done at Paris, 17 October 2003, and Council of Europe, European Landscape Convention, European Treaty Series No 176, done at Florence, 20 October 2000.

<sup>7</sup> See e.g. Christoph Beat Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO' (2006) *Journal of International Economic Law* 9:3, pp. 553-574.

<sup>8</sup> Graber, *ibid* at pp. 564-565.

<sup>9</sup> See e.g. Frederick Scott Galt, 'The Life, Death, and Rebirth of the 'Cultural Exception' in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony' (2004) *Washington University Global Studies Law Review* 3:3, pp. 909-935. See also *infra* section 4.

<sup>10</sup> In full citation: 'Culture is the heart of a nation. As countries become more economically integrated, nations need strong domestic cultures and cultural expression to maintain their sovereignty and sense of identity. Indeed some have argued that the worldwide impact of globalization is manifesting itself in the reaffirmation of local cultures. Canadian books, magazines, songs, films, new media, radio and television programs reflect who we are as a people. Cultural industries shape our society, develop our understanding of one another and give us a sense of pride in who we are as a nation'. See Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *New Strategies for Culture and Trade: Canadian Culture in a Global World*, 1999, at Executive Summary, paras 1 and 2.

<sup>11</sup> The UNESCO Convention has been discussed by a number of authors. See e.g. Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) *Journal of International Economic Law* 9:3, pp. 515-552; Graber, *supra* note 7; Christoph Beat Graber, 'Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity' in Hildegard Schneider and Peter van den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, Antwerpen: Intersentia, 2008, pp. 141-162; Craufurd Smith, *supra* note 4; Jan Wouters and Bart De Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) *Journal of Trade Law* 41:1, pp. 205-240; Rolf H. Weber, 'Cultural Diversity and International Trade – Taking Stock and Looking Ahead' in Kern Alexander and Mads Andenas (eds.), *The World Trade Organization and Trade in Services*, Leiden: Martinus Nijhoff, 2008, pp. 823-843; Christopher M. Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products' (2008) *International Law and Politics* 40, pp. 351-436, as well as the contributions to Nina Obuljen and Joost Smiers (eds.), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, Zagreb: Institute for International Relations, 2006.

## 2.1. Rights not Obligations

As an act of international law, the UNESCO Convention contains certain rights and obligations<sup>12</sup> with varying degrees of binding intensity upon which the Parties have agreed. The UNESCO Convention has however precious few obligations and these are formulated as mere stimuli for the Parties to adopt measures for the protection and promotion of cultural diversity at the national<sup>13</sup> and international<sup>14</sup> levels, rather than as genuine duties.<sup>15</sup> The only provision of binding nature<sup>16</sup> resembles the WTO's enabling clause<sup>17</sup> and relates to the preferential treatment for developing countries, whereby developed countries must facilitate cultural exchanges with developing countries by granting preferential treatment to cultural workers, as well as to cultural goods.<sup>18</sup>

The vagueness of the core obligation embodied in Article 7(1) to 'endeavour to create [...] an *environment* which encourages individuals and social groups: (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples; [and] (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world',<sup>19</sup> is indeed astounding. Furthermore, no 'punishment' for non-compliance is envisaged. Lack of action to achieve this 'environment' or any of the other best endeavour obligations contained in Articles 7-19, as Craufurd Smith notes, 'at worst, could result in a state being criticised by the Intergovernmental Committee or Conference of Parties [...] on the basis of the state's own four yearly reports'.<sup>20</sup> And, while such reporting exercises have proven advantageous in different settings,<sup>21</sup> they are

<sup>12</sup> Articles 5-19 of the UNESCO Convention.

<sup>13</sup> Articles 7-11 of the UNESCO Convention.

<sup>14</sup> Articles 12-19 of the UNESCO Convention, excluding Article 16, which is of binding nature.

<sup>15</sup> Graber, *supra* note 11.

<sup>16</sup> Another provision that qualifies as an obligation relates to the cooperation in providing assistance, in particular to developing countries, in situations of serious threat to cultural expressions (Article 17 of the UNESCO Convention).

<sup>17</sup> See GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause'). See also Bernard Hoekman, 'More Favorable Treatment of Developing Countries: Ways Forward' in Richard Newfarmer (ed.), *Trade, Doha, and Development: Window into the Issues*, Washington, DC: World Bank, 2006, pp. 213-221; Seung Wha Chang, 'WTO for Trade and Development Post-Doha' (2007) *Journal of International Economic Law* 10:3, pp. 553-570.

<sup>18</sup> Article 16 of the UNESCO Convention. For a comprehensive analysis, see Keith Nurse, Expert Report on Preferential Treatment (Article 16) in the UNESCO Convention on the Protections and Promotion of the Diversity of Cultural Expressions, 10 October 2008. Concluding his analysis, Nurse notes (at p. 24) that, '... the potential scope and impact of preferential treatment under the UNESCO Article 16 is quite narrow. Indeed, it can be argued that the main benefits are defined in terms of cultural cooperation and not in commercial terms. What Article 16 can facilitate are cultural exchanges, training, technical assistance and collaborations. The prospects for advancing the aims of expanding cultural industries and generating cultural exports are limited in scope and consequently it is difficult to see how Article 16 of the Convention, on its own, can adequately contribute to the protection and promotion of diversity of cultural expressions in a rapidly commercializing global cultural economy'.

<sup>19</sup> Emphasis added.

<sup>20</sup> Craufurd Smith, *supra* note 4, at p. 39 and Article 9(a) of the UNESCO Convention.

<sup>21</sup> For instance, in the framework of the EC 'Television without Frontiers' Directive, where Member States are obliged to report every two years on the application of Articles 4 and 5 of the Directive, regulating respectively the inclusion of European works and independent productions in television programmes (see Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23, at Article 4(3)). Under the 2007 Audiovisual Media Services Directive (introduced through amendment by Directive 2007/65/EC), this obligation remains.

unlikely to have any value here, since there exist neither any implementation criteria, nor any threat of sanctions.<sup>22</sup>

Despite the extremely limited obligations on the Parties to take action to protect and promote cultural diversity, the Convention formulates an extensive block of rights to that end. Article 6(2) of the UNESCO Convention provides a non-exhaustive list of measures that the Parties may adopt,<sup>23</sup> depicting 'with variable clarity'<sup>24</sup> basically all known cultural policy measures that states put in place, ranging from any 'regulatory measures aimed at protecting and promoting diversity of cultural expressions'<sup>25</sup> to the concrete example of public service broadcasting.<sup>26</sup> This 'all inclusive' approach signals that the Convention's object has been 'to endorse forms of market intervention rather than to preclude them'.<sup>27</sup>

Admittedly, non-exhaustive lists are not a rare phenomenon in intergovernmental treaty-making. They allow, through some vagueness and constructive ambiguity, the bringing together of an array of (at times diverging) interests and the actual closing of the deal. Yet, what makes the UNESCO Convention peculiar in this regard is the complete lack of criteria and/or mechanisms that would make these definitions workable, separating the licit from the illicit cultural policy measures.

This normative incompleteness is a striking feature of the UNESCO Convention and has been much criticised both by prominent negotiation Parties, notably the US,<sup>28</sup> and by a host of scholars,<sup>29</sup> who warn against protectionism, be it disguised or less so. It is indeed odd that while the Convention clearly acknowledges the dual nature of cultural goods and services and celebrates their cultural side,<sup>30</sup> no attempt is made to provide guidance on how states might reduce the trade-distorting effects of cultural policy measures. While a balance between the economic and cultural nature of goods, services and activities is undoubtedly complex, the UNESCO Convention could have at least made 'reference to principles such as proportionality or effectiveness, which could guide the application of these measures and serve to prevent more blatant forms of

<sup>22</sup> Craufurd Smith, *supra* note 4, at pp. 37-38.

<sup>23</sup> See Article 6(2)(a)-(h) of the UNESCO Convention.

<sup>24</sup> Hélène Ruiz Fabri, 'Reflections on Possible Future Legal Implications of the Convention' in Obuljen and Smiers, *supra* note 11, pp. 73-87, at p. 80.

<sup>25</sup> Article 6(2)(a) of the UNESCO Convention.

<sup>26</sup> Article 6(2)(h) of the UNESCO Convention. For an overview of the domestic cultural policy measures, see Mary E. Footer and Christoph Beat Graber, 'Trade Liberalisation and Cultural Policy' (2000) *Journal of International Economic Law* 3:1, pp. 115-144, at pp. 122-126.

<sup>27</sup> Craufurd Smith, *supra* note 4, at p. 40. In this sense, it also diverges from the contemporary theory of regulation seeking the slightest possible interference (see e.g. Richard R. Nelson (ed.), *The Limits of Market Organisation*, New York: Russell Sage, 2005; Anthony I. Ogus, *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press, 1994).

<sup>28</sup> The US noted in this regard: 'This instrument remains too flawed, too open to misinterpretation, and too prone to abuse for us to support'. See 'Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions', Statement by Louise V. Oliver, US Ambassador to UNESCO, Distributed by the Bureau of International Information Programs, US Department of State, available at <http://usinfo.state.gov>.

<sup>29</sup> See *supra* note 11. See also Mira Burri-Nenova, 'Trade and Culture: Making the WTO Legal Framework Conducive to Cultural Considerations' (2008) *Manchester Journal of International Economic Law* 5:3, pp. 3-39 and Mira Burri-Nenova, 'Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition' (2009) *Journal of International Economic Law* 12:1, pp. 1-46.

<sup>30</sup> The UNESCO Convention stresses that cultural goods and services have a distinctive nature as 'vehicles of identity, values and meaning' and that they intrinsically 'embody or convey cultural expressions, irrespective of the commercial value they may have'. See Articles 1(g) and 4(4) of the UNESCO Convention.

protectionism’.<sup>31</sup> This innate defect of normative incompleteness is aggravated by the lack of institutional or adjudicatory mechanisms that could procedurally clarify and complete the contract.<sup>32</sup>

## 2.2. Incompleteness of the UNESCO Convention

Next to the almost entirely missing obligations and implementation criteria, one should note that the framework of the UNESCO Convention is not comprehensive enough to secure the protection and promotion of cultural diversity, leaving some critical elements outside its otherwise generously defined scope of application.<sup>33</sup> Some of these missing elements are related to the centrality of state sovereignty, which is intrinsic to the UNESCO Convention. Indeed, the sovereignty of the State Parties in the cultural field is included as one of the eight guiding principles underpinning the Convention (Article 2(2)<sup>34</sup>) and all rights and obligations stemming from the Convention are attributed to states. While this is understandable for an intergovernmental treaty, cultural rights do not correspond to national boundaries.<sup>35</sup> The subscription to human rights and fundamental freedoms<sup>36</sup> may remedy this situation to some extent but it is nonetheless disappointing that specific cultural rights, which states must respect (such as access to education or use of language of choice) did not make it into the text,<sup>37</sup> in particular since they were acknowledged by the earlier but non-binding UNESCO Declaration on Cultural Diversity.<sup>38</sup> Furthermore, while the Convention does mention indigenous peoples and traditional cultural expressions a few times,<sup>39</sup> the relevant provisions remain declarative in nature and again address not the rights of the indigenous peoples themselves but those of the states whose territory is

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<sup>31</sup> Craufurd Smith, *supra* note 4, at pp. 40-41.

<sup>32</sup> The Convention’s exponents still hope that the Intergovernmental Committee and the Convention’s own dispute resolution mechanisms will fill in some gaps, since both allow evolutionary advances, depending upon the willingness of the Parties. It should be noted however that the dispute settlement is ultimately not compulsory and the tasks of the Intergovernmental Committee defined in Article 23(6) may not provide a solid legal basis for it to engage in interpretation of the Convention beyond commenting on the state reports (Article 23(6)(c)). See Hahn, *supra* note 11, at p. 533, who critically remarks that the UNESCO Convention’s dispute settlement is ‘worth mentioning only as being reminiscent of the very early days of modern international law’.

<sup>33</sup> Article 3 of the UNESCO Convention defines the scope of its application stating: ‘This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions’.

<sup>34</sup> The principle of sovereignty reads: ‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory’. See Craufurd Smith, *supra* note 4, at p. 37.

<sup>35</sup> In the narrow sense we mean here, above all, Article 27 of the International Covenant on Civil and Political Rights (CCPR) and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (CESCR). See Asbjørn Eide, ‘Cultural Rights as Individual Human Rights’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights*, 2nd ed., The Hague: Kluwer Law International, 2001, pp. 289-301; Elsa Stamatopoulou, *Cultural Rights in International Law*, Leiden: Brill, 2007.

<sup>36</sup> Articles 2(1), 2(3) and 7 of the UNESCO Convention. On the relationship between the Convention and human rights, see Graber, *supra* note 7, at pp. 560-563.

<sup>37</sup> Craufurd Smith, *supra* note 4, at pp. 28 and 37.

<sup>38</sup> Article 5 of the UNESCO Declaration states in the relevant part that, ‘[a]ll persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms’.

<sup>39</sup> Recitals 8, 13 and 15 of the preamble, Articles 2(3) and 7(1)(a) of the UNESCO Convention.



affected.<sup>40</sup> Besides this ethnocentricity in the formulation of the rights,<sup>41</sup> the UNESCO Convention establishes no specific rights for media organisations, journalists or individuals. Their interests are to be realised only through state action, if at all.<sup>42</sup>

A vital piece omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble,<sup>43</sup> is intellectual property rights (IPRs). This omission is particularly awkward, as we show in more detail below, since IPRs have as their core objective the protection and promotion of creativity and innovation, and are thus an indispensable element of all processes related to the creation, distribution of and access to cultural content.

A significant drawback of the Convention in terms of the critical role it was supposed to play as a counterforce to purely economic globalisation (epitomised by the WTO Agreements) is to be found in its 'conflict of laws' provision.<sup>44</sup> This crucial norm, as provided by Article 20 of the UNESCO Convention, has fallen victim of unfortunate negotiating and drafting and fails short of ensuring any meaningful interface with the rules of the WTO (or any other of the existing international agreements) in case of a conflict between them.<sup>45</sup> Article 20 provides simultaneously that, '[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties',<sup>46</sup> and that, 'without subordinating this Convention to any other treaty', Parties shall foster mutual supportiveness between the Convention and the other treaties to which they are parties.<sup>47</sup> Even without lengthy deliberations on the possible implementation and interpretation scenarios,<sup>48</sup> it is evident that this rather paradoxical formulation involves no modification of rights and obligations of the Parties under other existing treaties. Notwithstanding this, Parties are to take into account the relevant provisions of the Convention, when interpreting and applying other treaties or when entering into other international obligations.<sup>49</sup> Interestingly

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<sup>40</sup> The Convention also in this sense ignores recent developments in international law, such as the United Nations Declaration on the Rights of Indigenous Peoples, adopted with General Assembly Resolution 61/295, 13 September 2007.

<sup>41</sup> See Nicole Aylwin and Rosemary J. Coombe, 'Cultural Pluralism Protects Traditional Knowledge', 2006, available at [http://www.wacc.org.uk/wacc/publications/media\\_development/2006\\_3/cultural\\_pluralism\\_protects\\_traditional\\_knowledge](http://www.wacc.org.uk/wacc/publications/media_development/2006_3/cultural_pluralism_protects_traditional_knowledge) (last accessed 25 January 2009). See also Craufurd Smith, *supra* note 4, at p. 54.

<sup>42</sup> Craufurd Smith, *ibid.* at pp. 26 and 28.

<sup>43</sup> Recital 17 of the UNESCO Convention's preamble recognises 'the importance of intellectual property rights in sustaining those involved in cultural creativity'. Intellectual property rights used to be part of the definition of cultural goods and services during the drafting of the Convention. Article 7(2)(b) of the Preliminary Draft (CLT-2004/CONF.201/CLD.2, Paris, July 2004) provided further that Parties 'shall ensure that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy'. For a full account of the existing IPR references during the negotiation of the UNESCO Convention, see Laurence R. Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2007) *UC Davis Law Review* 40, pp. 971-1020, at pp. 1004-1006.

<sup>44</sup> On the notion of 'conflict', see Joost Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge: Cambridge University Press, 2003, at pp. 5-11.

<sup>45</sup> For all possibilities of conflict between the norms of the WTO, the commitments of the Members under them, and the measures taken under the UNESCO Convention for the protection and promotion of the diversity of cultural expressions, see Anke Dahrendorf, 'Free Trade Meets Cultural Diversity: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions' in Schneider and Van den Bossche, *supra* note 11, pp. 31-84. See also Graber, *supra* note 7; Wouters and De Meester, Bruner, and Hahn, all *supra* note 11.

<sup>46</sup> Article 20(2) of the UNESCO Convention.

<sup>47</sup> Article 20(1) of the Convention.

<sup>48</sup> See in this regard e.g. Graber, *supra* note 7, at pp. 565-568; Hahn, *supra* note 11, at pp. 540-546.

<sup>49</sup> Article 20(1) of the Convention.

in this context, Garry Neil has shown that the outcome of *Canada–Periodicals*<sup>50</sup> would have been identical even if the UNESCO Convention had been in force at the time the decisions were taken, and regardless of whether the US had or had not joined the Convention.<sup>51</sup>

Even if a new ‘trade *versus* culture’ WTO case emerges, which has been the hope of many observers as a final resolution of the conflict through the WTO jurisprudence, we think it highly unlikely that such a resolution would materialise. Glancing at the practice of the WTO adjudication until now, it is improbable that the Panel (and/or the Appellate Body) would dare to radically alter the ‘delicate and carefully negotiated balance’<sup>52</sup> of the WTO Agreements. Most likely, the adjudicative bodies would follow the conventional (less imaginative but solid) analysis, which justifies the legal expectations and concentrates on the core trade-related questions that fall within the DSB’s authority<sup>53</sup> (even though the instance of *US–Shrimp*<sup>54</sup> still offers fruitful soil for academic elaborations<sup>55</sup>). We deem it not very plausible in this regard that the WTO adjudicatory bodies would substantially ‘soften’ their standards<sup>56</sup> with regard to applying provisions key to the overall functioning of the multilateral trade system, such as the general exceptions contained in Articles XX GATT and XIV GATS (in particular the *chapeau* test).<sup>57</sup> Accounting for the vagueness of the UNESCO Convention’s provisions, Acheson and Maule note in addition that, ‘Panels of the WTO cannot take into account fuzzy concepts of cultural diversity without losing their legitimacy and ultimately their effectiveness’.<sup>58</sup> In any situation, the ongoing case against China and its

<sup>50</sup> WTO Panel Report, *Canada–Certain Measures Concerning Periodicals (Canada–Periodicals)*, WT/DS31/R, adopted 14 March 1997 and WTO Appellate Body Report, *Canada–Certain Measures Concerning Periodicals (Canada–Periodicals)*, WT/DS31/AB/R, adopted 30 June 1997.

<sup>51</sup> Garry Neil, ‘How Effectively Does the Convention Respond to the Cultural Challenges of Economic Globalization?’, 6 March 2006, available at <http://www.suisseculture.ch/doss/ridc/x-ridc.php> (last accessed 25 January 2009), at pp. 19–21.

<sup>52</sup> WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, para 177 (referring to the specific context of the WTO Agreement on the Applications of Sanitary and Phytosanitary Measures (SPS Agreement)).

<sup>53</sup> Article 3(2) of the DSU reads: ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’.

<sup>54</sup> WTO Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/R, adopted 15 May 1998, modified by WTO Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/AB/R, adopted 12 October 1998.

<sup>55</sup> See e.g. Graber, *supra* note 7, at p. 567.

<sup>56</sup> More than the deference the WTO adjudicatory bodies have already shown towards domestic regulators. See e.g. Eric H. Leroux, ‘From *Periodicals* to *Gambling*: A Review of the Systemic Issues Addressed by WTO Adjudicatory Bodies under the GATS’ in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds.), *GATS and the Regulation of International Trade in Services*, Cambridge: Cambridge University Press, 2008, pp. 236–275, at pp. 266–270.

<sup>57</sup> This is in contrast to the opinion expressed by Shaffer and Pollack. See Gregory Shaffer and Mark Pollack, ‘How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists’ (Paper presented at the Conference ‘Trade-And? The World Trade Organization’s Fuzzy Borders’, Graduate Institute of International and Development Studies Geneva, 5–6 February 2009; draft version of 12 January 2008; on file with the author), at pp. 58–62.

<sup>58</sup> Keith Acheson and Christopher Maule, ‘Convention on Cultural Diversity’ (2004) *Journal of Cultural Economics* 28, pp. 243–256, at p. 251. As Bruner also notes, ‘[i]f article 20 can be read to require nothing more than a good faith effort to interpret prior treaties in a manner consistent with the Culture Convention’s goals, then there is real reason to doubt that a WTO dispute resolution panel would exert itself to locate outcome-determinative rules and principles in the Culture Convention – particularly when the little relevant WTO case

measures affecting trading rights and distribution services for audiovisual entertainment products and certain publications<sup>59</sup> offers a test bed for these speculations.

Closing our critical glimpse of the UNESCO Convention, we concur with Craufurd Smith in saying that, what we have 'is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms. As a political manifesto, with little legal substance, it is hardly an advance on the international declarations on cultural diversity which preceded it'.<sup>60</sup> Alternatively, and less sharply, one can plainly say that what made the adoption of the UNESCO Convention possible also emptied it of some of its valuable content. This shows on the one hand the complexity of the issues that arise whenever cultural diversity is to be addressed and on the other hand, in a political context, the starkly different sensibilities and motivation of the Parties when drafting a legally binding international instrument on cultural matters.<sup>61</sup>

Exploring the interface between the UNESCO Convention and other regimes, the Convention would certainly influence the existing international agreements indirectly in the process of their interpretation.<sup>62</sup> Above all, the UNESCO Convention is likely to influence the political context of international agreements by changing the power-plays in negotiations and shaping the content of future agreements (since Parties are to take the Convention into account 'when entering into other international obligations'<sup>63</sup>). The latter with specific regard to the WTO has been one of the main stimuli (if not the only one) for a number of states to pursue the adoption of the UNESCO Convention, in particular as recent free trade agreements (FTAs) of the US have diminished flexibilities in comparison to GATS in the field of services, requiring states to establish a definitive 'negative' list of restrictions.<sup>64</sup>

### **3. Extreme Disconnect between the Issues of Trade and Culture: The UNESCO Convention as Part of the Problem Rather than the Solution**

While the Convention elevates 'the status of cultural diversity as a matter of international concern, just as international agreements on the environment and health have helped to underline the importance of these considerations in other

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law indicates that cultural products will not be treated differently from anything else subject to trade disciplines'. See Bruner, *supra* note 11, at p. 407 (footnotes omitted).

<sup>59</sup> See Henry Gao, 'The Mighty Pen, the Almighty Dollar and the Holy Hammer and Sickle: Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China' (2007) *Asian Journal of WTO and International Health Law and Policy* (AJWH) 2, pp. 313-343, at pp. 332-337 (referring to the case *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363, 16 April 2007; current state: panel formed; reports not yet distributed).

<sup>60</sup> Craufurd Smith, *supra* note 4, at pp. 53-54 (footnote omitted.).

<sup>61</sup> *Ibid.* at pp. 30-32. See also Caroline Pauwels, Jan Loisen and Karen Donders, 'Culture Incorporated; or Trade Revisited? How the Position of Different Countries Affects the Outcome of the Debate on Cultural Trade and Diversity' in Obuljen and Smiers, *supra* note 11, pp. 125-158.

<sup>62</sup> Graber, *supra* note 7, at pp. 567 and 571; Voon (2006), *supra* note 3, at p. 652.

<sup>63</sup> Article 20(1)(b) of the UNESCO Convention.

<sup>64</sup> Craufurd Smith, *supra* note 4, at p. 48. See also Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products*, Oxford: Hart, at pp. 201-232; Ivan Bernier, 'The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy Regarding the Audiovisual Sector', April 2004, available at <http://www.suisseculture.ch/doss/ridc/x-ridc.php> (last accessed 25 January 2009).

international fora such as the WTO',<sup>65</sup> we see this only partially as an advancement towards better functioning global governance system. Indeed, and here lies our core argument, one can view the UNESCO Convention as part of the problem rather than the solution. It is a sign of extreme disconnection between issues of trade and culture – a disconnection that does none of these domains good and does not reflect the developments in contemporary media markets.

In this sense, the 'serious concerns' expressed by the US that the Convention is likely 'to be misinterpreted in ways that might impede the free flows of ideas by word and image as well as affect other areas, including trade'<sup>66</sup> are to some extent justified, although their rhetorically exaggerated human rights dimension is questionable.<sup>67</sup> In the following sections, we expose the inadequacy of the UNESCO Convention to address the 'trade and culture' problematique in a broader context.

### 3.1. Flawed Understanding of the Effects of Trade upon Culture

Another feature that makes the pair of 'trade and culture' special (against the backdrop of other 'trade and ...' relationships) is the deeply convoluted (if not to say flawed) understanding of the effects of trade and more largely economic globalisation upon culture. While it is undoubted that 'trade generates complex and often contradictory effects',<sup>68</sup> it is equally certain that trade is not a 'zero-sum' game,<sup>69</sup> and there are a number of ways in which trade enhances cultural flows and exchanges. In the 'trade and culture' discourse however the common (and particularly loud) statements are that cultural diversity is impoverished and indeed almost extinguished as the globalised flow of easy entertainment coming from Hollywood dominates and homogenises.<sup>70</sup> This (mis)conception<sup>71</sup> is difficult to put right or at least soften. The discussion on 'trade values' and 'non-trade

<sup>65</sup> Craufurd Smith, *supra* note 4, at pp. 29-30. See also Voon (2006), *supra* note 3, at p. 652.

<sup>66</sup> In full citation, the US noted at the General Conference, immediately before the adoption of the UNESCO Convention: 'The United States of America is extremely disappointed with the decision that has just been taken. As we have explained in great detail, we have serious concerns about the potential of the Draft Convention to be misinterpreted in ways that might impede the free flows of ideas by word and image as well as affect other areas, including trade'. See UNESCO, Records of the General Conference, 33rd Session, 3-21 October 2005, Vol. 1, at p. 221.

<sup>67</sup> See e.g. Graber, *supra* note 7, at pp. 560-563.

<sup>68</sup> *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, Coventry, UK: University of Warwick, 2007, at p. 26.

<sup>69</sup> For some classic thoughts in this regard, see Paul Krugman, 'Competitiveness: A Dangerous Obsession' (1994) *Foreign Affairs* 73:2, pp. 28-44.

<sup>70</sup> For a critique of the cultural industries and on the homogeneity of content, see Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO*, Bern: Staempfli, 2003, at pp. 18 et seq.

<sup>71</sup> See e.g. Anthony Giddens, *Runaway World: How Globalisation Is Reshaping Our Lives*, London: Routledge, 2002. With regard to culture, Giddens (at p. xxiv) holds: 'Western, and more specifically American, cultural influence is visible everywhere – in films, television, popular music and other areas. Cultural standardisation is an intrinsic part of this process. Yet all this is relatively superficial cultural veneer; a more profound effect of globalisation is to produce greater local cultural diversity, not homogeneity. The United States itself is the very opposite of a cultural monolith, comprising as it does a dazzling variety of different ethnic and cultural groups. Because of its "push-down" effect [...] globalisation tends to promote a renewal of local cultural identities. Sometimes these reflect wider world patterns, but very often they self-consciously diverge from them'. Tyler Cowen also insists that global monopolies and imported technologies have led to promoting local creativity by generating new markets for innovative, high-quality artistic productions. See Tyler Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures*, Princeton: Princeton University Press, 2002, at p. 146 and Tyler Cowen, *In Praise of Commercial Culture*, Cambridge, MA: Harvard University Press, 1998, in particular at pp. 15-43.

values' is extremely over-politicised and often resembles a clash between two religions that find no communication path between them.

In the specific sense of cultural policy-making, the above debate is additionally burdened with notions of cultural and national identity that lead to national sovereignty susceptibilities. In the sub-context of policy-making in audiovisual media, the discussion is further complicated since 'one's view on the role of media in society is intimately bound up with one's view of democracy and the proper bounds of governmental power'.<sup>72</sup> Ultimately, all these interrelated discourses are in a profound state of transition: endogenously (within the nation state), 'as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a "digital economy"',<sup>73</sup> and exogenously (outside the nation state), as liberalisation, migration and other forces of globalisation<sup>74</sup> induce sweeping societal shifts that make modern society increasingly homogeneous across cultures and heterogeneous within them.<sup>75</sup> Under the latter circumstances, it becomes outdated and increasingly inappropriate to apply notions of cultural diversity, which 'tend to favour "billiard ball" representations of cultures as neatly bounded wholes whose contents are given and static. These understandings downplay "the ways in which meanings and symbols of culture are produced through complex processes of translations, negotiation and enunciation", as well as by contestation and conflict'.<sup>76</sup> To be clear, these are precisely the perceptions of the UNESCO Convention, whose premise is that it is cultural diversity between nations and not within nations that needs to be protected and promoted, and this stance shapes the cultural policy measures taken by the State Parties.

On a more pragmatic level, it needs to be mentioned that in the context of trade and culture, "'the fight [...] is seldom over 'high' culture", which the US, like many other nations, routinely subsidizes. What is really at stake is control over the flow of, and capacity to profit from, popular culture',<sup>77</sup> and what has been a thorn in the

<sup>72</sup> Bruner, *supra* note 11, at p. 432, referring also to Neil W. Netanel, 'The Commercial Mass Media's Continuing Fourth Estate Role' in Niva Elkin-Koren and Neil W. Netanel (eds.), *The Commodification of Information*, The Hague: Kluwer Law International, 2002, pp. 317-339, at pp. 317-18; C. Edwin Baker, *Media, Markets, and Democracy*, Cambridge: Cambridge University Press, 2001, at pp. 125-216.

<sup>73</sup> Tom O'Regan and Ben Goldsmith, 'Making Cultural Policy: Meeting Cultural Objectives in a Digital Environment' (2006) *Television and New Media* 7:1, pp. 68-91, at p. 88.

<sup>74</sup> Madhavi Sunder, 'Cultural Dissent' (2001) *Stanford Law Review* 54, pp. 495-567, at p. 498.

<sup>75</sup> See e.g. Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization*, Minneapolis, MN: University of Minnesota Press, 1996, at p. 48; Arif Dirlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*, Boulder, CO: Westview Press, 1998, at p. 72.

<sup>76</sup> Yudhishtir Raj Isar, 'Cultural Diversity' (2006) *Theory, Culture and Society* 23:2/3, pp. 371-375, at p. 372, referring to Nick Stevenson, *Cultural Citizenship: Cosmopolitan Questions*, Maidenhead: Open University Press, 2003, at p. 62. In terms of trade and culture, Singh has also noted that, '[t]he cultural voices coming through on the international commercial networks rely less on some primeval notion on authentic diversity than on hybridity and innovation. They serve to illustrate not just the complexity of cultures and their transnational linkages but, more importantly, a distinctiveness that is confident of borrowing from genres around the world and more or less unafraid of commercial processes'. See J.P. Singh, 'Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond' (2007) *International Studies Perspectives* 8, pp. 36-53, at p. 50, referring to Nestor Garcia Canlini, *Hybrid Cultures: Strategies for Entering and Leaving Modernity*, Minneapolis: University of Minnesota Press, 1995; Ulf Hannerz, *Cultural Complexity: Studies in the Social Organization of Meaning*, New York: Columbia University Press, 1993; Ulf Hannerz, *Transnational Connections: Culture, People, Places*, London: Routledge, 1996.

<sup>77</sup> Bruner, *supra* note 11, at pp. 363-364, referring to Oliver R. Goodenough, 'Defending the Imaginary to the Death?: Free Trade, National Identity, and Canada's Cultural Preoccupation' (1998) *Arizona Journal of International and Comparative Law* 15, pp. 203-253, at pp. 209-210. See also Ian Slotin, 'Free Speech and the

side of all 'exception culturelle' proponents is the fact that the US content industries have been 'America's most successful exporters'.<sup>78</sup>

A second misapprehension, although not as widely shared as the above and less politically charged, is that technological advances (which are also driven by globalisation) negatively affect the diversity of cultural expressions and demand more rather than less regulatory intervention.<sup>79</sup> In the context of the now almost ubiquitous digital networked environment, this view lies upon shaky foundations, as we show in the next section, and reflects the transition dilemmas of media regulation, as noted above.

### 3.2. The Changed Media Landscape

When talking about trade and culture in the context of the WTO, the scope of the debate is in fact extremely narrow and has plainly to do with audiovisual services.<sup>80</sup> These have been precisely the domain where the political pressure to accommodate different culture-oriented measures has been the strongest, and this has spilled over to other sectors (such as telecommunications services<sup>81</sup>) and to other negotiation themes (such as the WTO Work Programme on Electronic Commerce<sup>82</sup>). Because of the inherent sensitivities of the audiovisual services sector relating to its critical societal function and despite the considerable economic gains to be reaped from its liberalisation,<sup>83</sup> almost all Members, with the notable exception of the US, Japan and New Zealand,<sup>84</sup> have been reluctant to commit and have listed substantial MFN exemptions.<sup>85</sup> In the ongoing Doha Round, although the intensity of the confrontation has been lessened, there is little likelihood that Members will increase their level of commitments to any significant extent, as the negotiating proposals submitted for audiovisual services signal.<sup>86</sup>

The unwillingness to commit relates to the perceived need for sufficient room to intervene to safeguard the role of audiovisual media as sustaining the public

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*Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination'* (2002) Yale Law Journal 111:8, pp. 2289-2320.

<sup>78</sup> Bonnie J.K. Richardson, Vice-President Trade and Federal Affairs, Motion Picture Association of America, Impediments to Digital Trade: Hearing before the Subcommittee on Commerce, Trade and Consumer Protection of the House Committee on Energy and Commerce, 107th Congress 17, 2001. For data on Hollywood's dominance worldwide, see Bruner, *supra* note 11, at p. 354.

<sup>79</sup> See e.g. Graber, *supra* note 7, at p. 570.

<sup>80</sup> Pursuant to the Services Sectoral Classification List, audiovisual services encompass: motion picture and video tape production and distribution services; motion picture projection service; radio and television services; radio and television transmission services; sound recording and others. See WTO, Services Sectoral Classification List, WTO Doc.MTN.GNS/W/120, 10 July 1991, at 2(D).

<sup>81</sup> See Mira Burri-Nenova, 'The Law of the World Trade Organization and the Communications Law of the European Community: On a Path of Harmony or Discord?' (2007) *Journal of World Trade* 41:4, pp. 833-878.

<sup>82</sup> WTO, Work Programme on Electronic Commerce Adopted by the General Council on 25 September 1998, WT/L/274, 30 September 1998; WTO, Work Programme on Electronic Commerce: Background Note by the Secretariat, G/C/W/128, 5 November 1998.

<sup>83</sup> Martin Roy, 'Audiovisual Services in the Doha Round: Dialogue de Sourds, The Sequel?' (2005) *Journal of World Investment and Trade* 6:6, pp. 923-952, at p. 941.

<sup>84</sup> The rest of the 18 Members that undertook commitments are mostly developing countries and include the Central African Republic, the Dominican Republic, El Salvador, Gambia, Hong Kong China, India, Israel, South Korea, Mexico, Nicaragua, Singapore and Thailand.

<sup>85</sup> Roy, *supra* note 83, at p. 927.

<sup>86</sup> See WTO Documents S/CSS/W/21 (US); S/CSS/W/74 (Switzerland); S/CSS/W/99 (Brazil). The proposal of Japan was not specific to audiovisual services and can be found in WTO Document S/CSS/M/8. There is also the Joint Statement by Hong Kong China, Japan, Mexico, Taiwan and the US, TN/S/W/49. For comments on the expressed positions, see Roy, *ibid.* at pp. 931-936. See also Rafael Leal-Arcas, 'Services as Key for the Conclusion of the Doha Round' (2008) *Legal issues of Economic Integration* 35:4, pp. 301-321-

sphere and cultural and national identities. The underlying 'axioms' of state intervention in this context have been (i) that some sort of additional regulation is indispensable because of the failures inherent to media markets<sup>87</sup> and (ii) that these market failures can be corrected through state measures (as the UNESCO Convention evidently purports). As to the former, the common statement is that, '[e]conomic theory as well as reality shows that the market fails to provide culture goods and services'.<sup>88</sup> While this rather undifferentiated assertion can be questioned in all sorts of aspects,<sup>89</sup> such discussions often boil down to the problem that both sides speak different languages and economic arguments are subsumed under the politically driven propositions.<sup>90</sup> Instead of engaging in arbitrary debates, we argue in the following that even if some sort of regulatory intervention were necessary in conventional media markets, this is not completely true for the contemporary media landscape, which has been utterly changed with the advent and widespread of digital media (in particular the internet). The argument in support of this thesis is two-prong and relates on the one hand to the modified mechanisms in digital media markets and to the availability of new modes of creating, distributing and accessing cultural content, on the other.

At the core of these changes is the ability of the digital mode to express any type of information (words, images, sounds, etc.) in binary digits. By reducing information to zeroes and ones, digital representation radically modifies the characteristics of content. It is for one freed from the need of a tangible medium that contains it and allows its swift distribution at almost no cost. A second salient feature that has caused much uproar with both big media conglomerates and small indigenous communities,<sup>91</sup> is the ability to make perfect copies. A third, less noted, but perhaps the furthest-reaching characteristic of digital media is that they have changed the way information is ordered and accessed.<sup>92</sup>

Under the broader category of market induced modifications in the digital environment<sup>93</sup>, as the re-production, storing and distribution of digital media

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<sup>87</sup> The most prominent reference here is Baker, *supra* note 72.

<sup>88</sup> See Wouters and De Meester, *supra* note 11, at p. 217. It is common for studies not to provide the complete list of market-related specificities and focus only on the size of the market and the economies of scale as reasons for the market to fail (see e.g. Wouters and De Meester, *ibid.* at pp. 217-218; Hahn, *supra* note 11, at pp. 519-520). In a more comprehensive version, failures typical of the markets for cultural goods and services can be identified as: (i) failures due to economies of scale in production and distribution; (ii) failures due to the nature of competition in products with substantial public goods aspects; (iii) failures due to the impact of externalities on the pricing of cultural products; and (iv) failures due to collective action problems. See Pierre Sauvé and Karsten Steinfatt, 'Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?' in Productivity Commission and Australian National University, *Achieving Better Regulation of Services*, Canberra: AusInfo, 2000, pp. 323-346, at p. 325.

<sup>89</sup> See e.g. Galt, *supra* note 9, pp. 917-919. See also generally Richard A. Posner, *The Economic Analysis of Law*, 7th ed., The Hague: Aspen Publishers, 2007.

<sup>90</sup> There are for instance economic models that show that trade restrictions enhance welfare. Such a cultural trade model involving two countries, the US and France, in which a French tariff on film imports can be optimal, is valid however with the critical assumptions that Hollywood can produce exportable films but the French industry cannot; nationals of one country cannot invest or participate as professionals in the other's film industry, and there is no price discrimination. See Patrick François and Tanguy van Ypersele, 'On the Protection of Cultural Goods' (2002) *Journal of International Economics* 56, pp. 359-369.

<sup>91</sup> See e.g. Mira Burri-Nenova, 'The Long Tail of the Rainbow Serpent: New Technologies and the Protection and Promotion of Traditional Cultural Expressions' in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham, UK: Edward Elgar, 2008, pp. 205-236.

<sup>92</sup> David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder*, New York: Henry Holt, 2007.

<sup>93</sup> Here we refer basically to the so-called 'long tail' theory. The name has to do with the image of a demand curve that gets longer and longer and covers more niche 'non-hit' products. The 'long tail' theory was

products is at a marginal cost close to zero, it becomes economically viable to sell relatively unpopular products. This creates incentives for suppliers to offer a larger and more diverse portfolio including also 'non-hit' titles that appeal to smaller niche audiences.<sup>94</sup> The digital setting also reduces the significant entrepreneurial risk inherent in launching new cultural goods and services<sup>95</sup> (at least for some of them), while making their visibility greater. This is in stark contrast to the substantial storage and distribution costs in the offline world, where the 'shelf space' (be it TV prime time or a Christmas cinema weekend) is limited.<sup>96</sup>

Traditional media companies have also faced horrendous promotion costs, which were unbearable for smaller producers or individual artists. In the digital ecology, the supply and demand are however somewhat more easily 'connected' as the internet allows searching through a single point of entry. This search process is also dynamic and next to the conventional search engines, samples, feedbacks and other advanced search tools based upon collective intelligence,<sup>97</sup> enable users to discover even new products raising the diversity of content consumed.<sup>98</sup>

In the longer run and as the consumer becomes more and more empowered to choose as we move along from a 'push' to a 'pull' (i.e. from broadcasting to on-demand) mode of content consumption,<sup>99</sup> it is conceivable that consumer selection will constantly generate new and/or niche products (similarly to the Amazon bookselling platform<sup>100</sup>), thus inducing markets to offer new types of content, including, for instance, archived or original works, documentaries or director's

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coined by Chris Anderson, chief editor of the Wired Magazine (see Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York: Hyperion, 2006) but builds upon substantiated previous and parallel economic research. See in particular Erik Brynjolfsson, Yu Hu and Michael D. Smith, 'From Niches to Riches: The Anatomy of the Long Tail' (2006) *Sloan Management Review* 47:4, pp. 67-71; Erik Brynjolfsson, Yu Hu and Duncan Simester, 'Goodbye Pareto Principle, Hello Long Tail: the Effect of Search Costs on the Concentration of Product Sales' (2007) MIT Center for Digital Business Research Paper.

<sup>94</sup> This may also be true for offering products in diverse languages. While most websites are still in English, it is a fact that as the internet becomes ubiquitous people around the world prefer their news, stories and local gossips in their own language. The free online encyclopaedia Wikipedia, for instance, while having the greatest number of articles in English (2,709,400), exist also in 264 other languages. See [http://meta.wikimedia.org/wiki/List\\_of\\_Wikipedias](http://meta.wikimedia.org/wiki/List_of_Wikipedias) (last accessed 25 January 2009).

<sup>95</sup> Germann argues that this specificity of cultural goods and services is the main one that commands intervention. See Christophe Germann, 'Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity' (2005) *ERA—FORUM* 6:1, pp. 109-130, at p. 116.

<sup>96</sup> The comparison between the offline and online availability of content may be quite striking: A large CD shop may hold about 40,000 titles, while an online music store will have about 20 times more. A TV station can broadcast only one particular film in the eight o'clock slot, while its catalogue of digitally stored and distributed films may amount to more than 1,000 titles. Moreover, one should note that these are contradistinctions relating to only one particular distribution channel, while in the reality of the digital environment, these are multiple and simultaneously accessible.

<sup>97</sup> Also called wisdom of the crowds. See James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, and Nations*, New York: Anchor, 2003.

<sup>98</sup> See Brynjolfsson et al. (2006), *supra* note 93.

<sup>99</sup> This is likely to become more pronounced and induce even more radical changes in the business models of content providers, distributors and advertisers, continuously fragmenting the media environment. See John Naughton, 'Our Changing Media Ecosystem' in Ed Richards et al. (eds.), *Communications: The Next Decade*, London: Ofcom, 2006, pp. 41-50. See also David Graham and Associates, *Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for under Article 25(a) of the TV Without Frontiers Directive*, Final Report prepared for DG Information Society, 24 May 2005, at section 3.5.1.

<sup>100</sup> Erik Brynjolfsson, Yu Hu and Michael D. Smith, 'Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers' (2003) MIT Sloan Working Paper No 4305.



cuts, be it European, American or African.<sup>101</sup> This may ultimately lead to a higher share of available and effectively consumed 'good' works, which, if realised, will be a genuine expression of cultural diversity.

The second category of changes due to the properties and the dynamics of the digital space has to do with new modes of production of information, knowledge and entertainment, whereby users become active creators, individually or as part of the community.<sup>102</sup> Some of this user created content (UCC) reflects the key media policy components of diversity, localism and non-commercial<sup>103</sup> and may become critical for the attainment of cultural objectives.<sup>104</sup> The changes relate not only to what some call 'amateurs'<sup>105</sup> but profoundly affect how all artists and culture-makers express themselves, how they communicate with one another and with the public, how cultural content is presented and made accessible, and how it is consumed.<sup>106</sup>

Against this backdrop,<sup>107</sup> most of the currently applied 'analogue-based' cultural policy measures, which are based primarily on the idea of protecting some 'shelf-space' for culturally or nationally distinctive productions by putting up barriers to incoming foreign cultural goods and services or privileging domestic ones, seem inappropriate, since the digital 'shelf-space' is virtually unlimited. Furthermore, if the 'pull' model is to become the dominant model of consumption of media content, it is also impossible to 'reserve' space for a certain purpose, since it is the consumer herself or himself, who decides about the content, its form and time of delivery. We also need to think about the changed dimensions of markets: while not all markets for media content (be it music, video, or film) will be considered global in the competition law sense, the digital environment does allow searching, finding and accessing information without linking to the real-life

<sup>101</sup> Edwin Horlings, Chris Marsden, Constantijn van Oranje and Maarten Botterman, *Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive*, RAND Europe, 2005, at p. 66.

<sup>102</sup> A 2007 OECD Report summarises these effects stating that, '[t]he Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships [...]. Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially give rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless.' See OECD, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007, at p. 5.

<sup>103</sup> Ellen P. Goodman, 'Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets' (2004) *Berkeley Technology Law Journal*, pp. 1389-1472, at pp. 1395-1399. For case studies, see also *News and Informations as Digital Media Come of Age*, Report of the Berkman Center for Internet and Society at Harvard University, 18 December 2008.

<sup>104</sup> For a specific analysis of UCC in virtual worlds, see Mira Burri-Nenova, 'User Created Content in Virtual Worlds and Cultural Diversity' in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Governance of Digital Game Environments and Cultural Diversity*, Cheltenham, UK: Edward Elgar, forthcoming 2009.

<sup>105</sup> For a critical opinion in this regard, see Andrew Keen, *The Cult of the Amateur: How Today's Internet Is Killing Our Culture*, New York: Doubleday, 2007.

<sup>106</sup> Digitisation, both as a tool of expression and as a new cultural communication space 'affects the entire spectrum of culture production, distribution and presentation [...] [and] brings with it the promise of cultural renewal'. See Netherlands Council for Culture, *From ICT to E-Culture: Advisory Report on the Digitalisation of Culture and the Implications for Cultural Policy*, submitted to the State Secretary for Education, Culture and Science, June 2003 (English edition, August 2004), at p. 8. See also PEW Internet and American Life Project, Artists, Musicians and the Internet, December 2004; Tom O'Regan and Ben Goldsmith, 'Emerging Global Ecologies of Production' in Dan Harries (ed.), *The New Media Book*, London: British Film Institute Publishing, pp. 92-105.

<sup>107</sup> For a more detailed analysis, see Mira Burri-Nenova, 'The Changing Environment of Audiovisual Media: New Technologies, New Patterns of Consumer/Business Behaviour and Their Implications for Audiovisual Media Regulation' (2007) *medialex* 4, pp. 171-177.

location of the user.<sup>108</sup> This certainly defies standard media regulation thinking, arguing that state intervention should be permitted to the extent that liberalised trade exacerbates market failures,<sup>109</sup> emphasising among other things the enormous advantage of the US due to the size of its home market.

To wrap up the above arguments, one may legitimately question any cultural policy measure that restricts trade by erecting barriers to incoming foreign cultural goods and services under the conditions of a digital networked environment. If such measures are maintained, we hold that they serve either protectionist<sup>110</sup> or political<sup>111</sup> interests, or are the remnants of the ill-conceived (but politically widely accepted) perception of globalisation and its effects upon culture.

The digital networked environment is not however some sort of panacea remedying all existing problems related to media. Indeed, we may see the emergence of new problems that require additional regulatory intervention, such as cyber-balkanisation,<sup>112</sup> extreme audience fragmentation and an exacerbated split between digital and analogue households, not only in developing and least developed societies<sup>113</sup> but also in developed societies.<sup>114</sup> As national regulators grapple with these transformations, some of which are still in their infancy, we may see the emergence of new priorities of media regulation,<sup>115</sup> as well as new toolboxes to address them (e.g. no quotas, more subsidies), which are ultimately to be reflected at the international level.

### 3.3. Ignoring Other Relevant Domains

Looking at the broader picture, the extreme focus on (to put it bluntly) television in the ‘trade and culture’ debate can be said to be inappropriate and potentially missing on far more important developments. One domain that has suspiciously been left aside in the cultural diversity policy endeavours is that of intellectual property rights. As noted above, the UNESCO Convention only mentions IPRs in the preamble, recognising their ‘importance [...] in sustaining those involved in cultural creativity’<sup>116</sup> but clarifies no further intersections, nor does it create any obligations for the State Parties in this regard.

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<sup>108</sup> Here one should however acknowledge the possibilities of filtering information on the Internet, mostly done for political reasons. See Ronald J. Deibert, John G. Palfrey, Rafal Rohozinski and Jonathan Zittrain, *Access Denied: The Practice and Policy of Global Internet Filtering*, Cambridge, MA: MIT Press, 2007.

<sup>109</sup> Baker, *supra* note 72, at p. 121.

<sup>110</sup> Such as for instance the EC TV quotas for European content, as we have argued elsewhere. See Mira Burri-Nenova, ‘The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity’ (2007) *Common Market Law Review* 44:6, pp. 1689-1725.

<sup>111</sup> In the sense of supporting a political regime like in China. See Gao, *supra* note 59; Deibert et al., *supra* note 108.

<sup>112</sup> Marshall Van Alstyne and Erik Brynjolfsson, ‘Global Village or Cyber-Balkans? Modeling and Measuring the Integration of Electronic Communities’ (2004) *Management Science* 51, pp. 851-868.

<sup>113</sup> See e.g. Enyinna S. Nwauche, ‘African Countries’ Access to Knowledge and the WIPO Digital Treaties’ (2005) *The Journal of World Intellectual Property* 8:3, pp. 361-382.

<sup>114</sup> If Internet penetration stabilises at 65-75% by household and mobile phone penetration at 85%, this means that a substantial proportion of people will remain offline – a minority, which is ‘both the most vulnerable in society and least likely to change (typically comprising the most elderly, non-formally qualified and/or poorest quartiles)’. See Horlings et al., *supra* note 101, at p. 6.

<sup>115</sup> For some suggestions, see Burri-Nenova, *supra* note 107, at pp. 176-177.

<sup>116</sup> Recital 17 of the UNESCO Convention’s preamble.

This is peculiar since it could be argued that IPRs<sup>117</sup> have been the oldest and are now the most advanced system put in place with the ultimate goal of fostering creativity,<sup>118</sup> and has elaborated over the years a broad palette of sophisticated and flexible IP tools 'to protect both traditional and new forms of symbolic value produced in particular places as they circulate in global commodity markets'.<sup>119</sup> IPRs can be said to strongly influence the creation, distribution, access and re-use of any cultural content,<sup>120</sup> i.e. every element of the cultural value chain. Moreover and in subtler ways, IPRs impinge upon the entire cultural environment.<sup>121</sup>

The contemporary global IPR system is however not a simple, smoothly working block of rules but complex and full of ambiguities, and as many argue, imperfections.<sup>122</sup> In this sense, there could have been a number of ways in which the UNESCO Convention could have addressed these deficiencies, or at least stirred the debates at the international level towards possible more cultural diversity-conducive forms of rights protection.

The deficits of the existing IPR architecture relate on the one hand to the inherent centrality of authorship, originality and mercantilism to the 'Western' IP model, which leaves numerous non-Western, collaborative or folkloric modes of production outside the scope of IP protection.<sup>123</sup> On the other hand, some imperfections stem from the way IPR protection is granted, whereby authors receive a temporary monopoly over their creations and thus exclude the rest of the public from having access to the protected works. In addition, while this monopoly has initially been vested to the creators, presently 'these rights are routinely

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<sup>117</sup> Under IPR as a general category, one understands the rights granted to creators and inventors to control the use made of their productions. They are traditionally divided into two main branches: (i) 'copyright and related (or neighbouring) rights' for literary and artistic works and (ii) 'industrial property', which encompasses trademarks, patents, industrial designs, geographical indications and the layout designs of integrated circuits. In the following, we discuss primarily the first category.

<sup>118</sup> As the US Constitution (at Article I, Section 8, para. 8) beautifully puts it: '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.

<sup>119</sup> Rosemary J. Coombe, Steven Schnoor and Mohsen Ahmed, 'Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property' (2007) *UC Davis Law Review* 40, pp. 891-917, at p. 916, referring also to Wend B. Wendland, 'Intellectual Property and the Protection of Cultural Expressions: The World of the World Intellectual Property Organization' in F. Willem Grosheide and Jan J. Brinkof (eds.), *Intellectual Property Law 2002*, Antwerp: Intersentia, 2003, at pp. 101, 103.

<sup>120</sup> Raymond Shih Ray Ku, 'Promoting Diverse Cultural Expression: Lessons from the US Copyright Wars' (2007) *Asian Journal of WTO and International Health Law and Policy (AJWH)* 2, pp. 369-398, at p. 376.

<sup>121</sup> As Tomer Broude has observed, '... intellectual property rights influence cultural change or stability in a number of ways. On one hand, they provide simplified channels of communication in the form of protected inventions, creative content, brands, titles, etc., which make the diffusion of knowledge more efficient. Such simplification is particularly necessary in cross-cultural exchanges, in which the heterophily of participants is increased due to cultural differences. In this respect, intellectual property rights may be expected to facilitate cultural exchange and indeed change. On the other hand, the exclusivity of intellectual property rights may raise the diffusion costs of new knowledge, hampering cultural exchange, or permitting it to occur only in knowledge areas in which the rights' holders consider the exchange to be cost-effective, thus making it contingent on their particular interests. Cultural shifts might then be restrained, having lower impact on the knowledge-receiving society. For the same reasons, intellectual property protection may also have a preserving effect on a knowledge-supplying society, if rights are used to protect cultural practices from dilution and abuse through duplication and diffusion'. See Tomer Broude, 'Conflict and Complementarity in Trade, Cultural Diversity and Intellectual Property Rights' (2007) *Asian Journal of WTO and International Health Law and Policy (AJWH)* 2, pp. 346-368, at pp. 355-356.

<sup>122</sup> See e.g. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, New York: New York University Press, 2003; Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, London: Penguin, 2008.

<sup>123</sup> See the contributions to Graber and Burri-Nenova, *supra* note 91, in particular these of Fiona Macmillan, Wend B. Wendland, Christoph Beat Graber and Mira Burri-Nenova.

assigned away to the distributor of the work in order to gain access to the channels of distribution and their audience'.<sup>124</sup> The distributors (normally big media conglomerates) have been the ones, who have set the terms and determined which works will be made available to the public,<sup>125</sup> and have thus exercised substantial control over the existing cultural content.<sup>126</sup>

It is not certain whether the existent IP model appropriately reflects the precarious balance between the private interests of authors and the public interest in enjoying broad access to their productions,<sup>127</sup> and whether in this balance the best incentives to promote creativity are given.<sup>128</sup> The doubts expressed get even deeper under the conditions of the digital ecology, which have magnified the value of copyright law<sup>129</sup> and expanded its reach<sup>130</sup> (making it also less porous through the applied Digital Rights Management systems (DRM) and other technological protection measures<sup>131</sup>).

Unsurprisingly, the content industries (i.e. mainly the above-mentioned intermediaries<sup>132</sup>) are quite sure of copyright's virtues and have convinced most governments that strong and enforceable IPRs are the *sine qua non* for a vibrant culture. Through race-to-the-top strategies,<sup>133</sup> this strong protection has been

<sup>124</sup> Ku, *supra* note 120, at p. 377, referring also to Neil W. Netanel, 'Market Hierarchy and Copyright in Our System of Free Expression' (2000) *Vanderbilt Law Review* 53:6, pp. 1879-1932, at p. 1889.

<sup>125</sup> Ku, *ibid.*

<sup>126</sup> As commercial enterprises, the pursuit of a maximisation of profits and a minimisation of financial risks has been a primary goal of these media companies. They have strived to offer a constant flow of hits and this has resulted also in much 'imitation, blandness and the recycling of those genres, themes and approaches regarded as profitable'. See Denis McQuail, 'Commercialisation and Beyond' in Denis McQuail and Karen Siune (eds.), *Media Policy: Convergence, Concentration and Commerce*, London: Sage, 1998, pp. 107-127, at pp. 119-120; Laurie Ouellette and Justin Lewis, 'Moving Beyond the "Vast Wasteland": Cultural Policy and Television in the United States' (2000) *Television and New Media* 1:1, pp. 95-115, at p. 96. See also Frank Webster, *Theories of the Information Society*, London: Routledge, 1995, at p. 22.

<sup>127</sup> See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15(1)(c)), UN Doc. E/C.12/2005, 21 November 2005, at para 35. See also Michael D. Birnhack, 'Global Copyright, Local Speech' (2006) *Cardozo Arts and Entertainment Law Journal* 24, pp. 491-547.

<sup>128</sup> See Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) *UC Davis Law Review* 40, pp. 1151-1205, at pp. 1193-1194; Julie E. Cohen, 'The Place of the User in Copyright Law' (2005) *Fordham Law Review* 74, pp. 347-374; Siva Vaidhyanathan, 'The Googlization of Everything and the Future of Copyright' (2007) *UC Davis Law Review* 40, pp. 1207-1231.

<sup>129</sup> Julie E. Cohen, 'Pervasively Distributed Copyright Enforcement' (2006) *Georgetown Law Journal* 95, pp. 1-48.

<sup>130</sup> Lawrence Lessig, '(Re)creativity: How Creativity Lives' in Helle Porsdam (ed.), *Copyright and Other Fairy Tales: Hans Christian and the Commodification of Creativity*, Cheltenham, UK: Edward Elgar, 2006, pp. 15-22, at p. 19.

<sup>131</sup> DRM have been aimed at protecting digital content from uncontrolled distribution and unlawful use but have also had pernicious effects, eroding some fundamental rights of consumers and restricting usages, traditionally allowed under copyright. See e.g. Nicola Lucchi, 'Countering the Unfair Play of DRM Technologies' (2007) *Texas Intellectual Property Law Journal* 16:1, pp. 91-124.

<sup>132</sup> 'In other words, the middlemen of old are using copyright to preserve their status in a world in which many of these middlemen are not only unnecessary but also stifle an environment for creating, producing, and disseminating diverse cultural expression'. See Ku, *supra* note 120, at p. 372. See also Raymond Shih Ray Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' (2002) *University of Chicago Law Review* 69:1, pp. 263-324, at p. 301.

<sup>133</sup> As Netanel notes, 'one of the disadvantages of legal regimes that allow firms to earn supracompetitive profits is that they provide a strong incentive for socially wasteful spending on lobbying and litigation to maintain those rents'. See Neil W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique' in Fiona Macmillan (ed.), *New Directions in Copyright Law: Vol. 6*, Cheltenham, UK: Edward Elgar, 2008, pp. 3-34, at p. 4, referring to Fred S. McChesney, 'Rent Extraction and Rent Creation in the Economic Theory of Regulation' (1987) *Journal of Legal Studies* 16:1, pp. 101-114 and Richard A. Posner, 'The Social Costs of Monopoly and Regulation' (1975) *Journal of Political Economy* 83:4, pp. 807-828.

emancipated to the international level in the framework of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and in the even further-reaching free trade agreements.<sup>134</sup> IPRs have thereby become ‘a matter of trade’<sup>135</sup> and this ‘globalization of copyright law and its shift from “the field of cultural production” to that of trade has reshuffled the cards [...] and destabilized previous balances’.<sup>136</sup>

As we noted, the UNESCO Convention is far from acknowledging any of these developments, mostly due to the political interests vested in the current IP system and ignores the critical role IPRs play in ensuring sustainable access to cultural goods and sustainable production of culturally diverse content.<sup>137</sup> Interestingly, it has been outside the institutional domain of ‘culture’, where the above processes have been felt and reacted upon. The World Intellectual Property Organization (WIPO) has long admitted that certain amendments to the existing IP architecture and a search for new forms are necessary because of the need for: (i) the preservation and safeguarding of intangible cultural heritage; (ii) the promotion of cultural diversity; and (iii) the promotion of creativity and innovation, including tradition-based forms.<sup>138</sup> The WIPO Development Agenda, adopted by the WIPO General Assembly in September 2007<sup>139</sup> rejects a purely IP-centric view. ‘It posits that strong intellectual property protection does not consistently promote creative activity, facilitate technology transfer, or accelerate development’ and ‘places the benefits of a rich and accessible public domain, national flexibilities in implementing IP treaty norms, access to knowledge, UN development goals, curbing of IP-related anti-competitive practices, and the need to balance the costs and benefits of intellectual property protection firmly within WIPO’s central mission’.<sup>140</sup> It remains yet to be seen how these initiatives will be implemented and linked to the TRIPS framework.

### 3.4. Intensified Fragmentation

We are fully aware that the area of ‘trade and culture’ reveals extreme fragmentation and ‘no homogenous, hierarchical meta-system is realistically available to do away with such problems of [conflicting rules and overlapping legal regimes]’.<sup>141</sup> The UNESCO Convention has however in no sensible way contributed to at least mitigating this condition but has rather, in our mind, intensified it by allowing any discriminatory intervention in the pursuit of the

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<sup>134</sup> Netanel, *ibid.*

<sup>135</sup> Birnhack, *supra* note 127, at p. 493.

<sup>136</sup> Birnhack, *ibid.* at pp. 492-493, referring to Pierre Bourdieu, *The Field of Cultural Production*, New York: Columbia University Press, 1993.

<sup>137</sup> Rosemary J. Coombe, ‘Protecting Cultural Industries to Promote Cultural Diversity: Dilemma for International Policy-Making Posed by the Recognition of Traditional Knowledge’ in Keith E. Maskus and Jerome H. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Property Regime*, Cambridge: Cambridge University Press, 2005, pp. 559-614, at p. 613.

<sup>138</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2 May 2003, Annex, at para 8.

<sup>139</sup> WIPO Doc. A/43/16, at Annex A.

<sup>140</sup> Neil W. Netanel, ‘The WIPO Development Agenda and Its Development Policy Context’ in Neil W. Netanel, *The Development Agenda: Global Intellectual Property and Developing Countries*, Oxford: Oxford University Press, 2009, pp. 1-32, at p. 2.

<sup>141</sup> United Nations, Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law, Report of the Work of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13 July 2006, at para 493.

hazily defined goal of protecting and promoting cultural diversity. While one may say that this is perhaps not all too bad since it just reflects the *status quo* of media regulation in the Convention's State Parties, we can still delineate the contours of intensified fragmentation of negotiation themes and of negotiation fora (through a transfer from multilateral to regional and bilateral venues). We offer the instance of trade in digital products to explicate both these strands.

While at first sight, trade in digital products can easily be subsumed under the rules of the WTO, the issue has been contested since the days of GATT 1947,<sup>142</sup> mostly due to its unsettled classification and the intense relation to the audiovisual services sector. Due to the latter, the digital trade domain has grown to be another field where the cultural exception battle has been fought and this has had grave repercussions for the whole system of multilateral rules, which due to this conflict is not yet prepared to fully and clearly address the nascent digital trade. The issue has remained unsettled because of the starkly different positions of the major negotiation drivers, the EC and the US, which also reflect their pro-culture/pro-trade stances during the UNESCO Convention's debates. The EC zealously argues that, '[e]lectronic deliveries consist of supplies of services which fall within the scope of the GATS',<sup>143</sup> and seeks to ensure that all digital media fall within the category of audiovisual services, thus retaining its flexibility for MFN exemptions and limited commitments. The US takes the opposite position and has sought the deepest mode of liberalisation available, i.e. that of GATT (coupled with the Information Technology Agreement).<sup>144</sup> These diametrically opposed agendas of the EC and the US admit no straightforward solution (at least not in the short term) and leave the vital economic field of digital trade in a haze of uncertainty,<sup>145</sup> with substantial negative spillovers.<sup>146</sup>

The lack of solutions<sup>147</sup> within the multilateral context of the WTO has also led Members to take other, bilateral or regional, paths to advance their policy priorities.

<sup>142</sup> In 1961, the US requested the establishment of a Working Party to examine the application of GATT 1947 to television programmes. The US argued that TV programmes are goods under GATT 1947 but do not fall under Article IV, which covers only 'cinematograph films'. The US proposed that Members be required to balance national regulations reserving transmission time to domestic programmes with reasonable access to foreign programmes. See GATT, Application of GATT to International Trade in Television Programmes, L/1615, 16 November 1961; GATT, Application of GATT to International Trade in Television Programmes: Proposal by the Government of the United States, L/2120, 18 March 1964.

<sup>143</sup> WTO, Communication from the European Communities and their Member States: Electronic Commerce Work Programme, S/C/W/183, 30 November 2000, at para 6(a).

<sup>144</sup> WTO, Work Programme on Electronic Commerce: Submission by the United States, WT/COMTD/17; WT/GC/16; G/C/2; S/C/7; IP/C/16, 12 February 1999.

<sup>145</sup> Although the *US–Gambling* rulings have confirmed that WTO rules are applicable to electronically supplied services. See WTO Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US–Gambling)*, WT/S285/R, adopted 10 November 2004, confirmed by Appellate Body Report, WT/DS285/AB/R, adopted 7 April 2005. See also Sacha Wunsch-Vincent, 'The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization' (2003) *Aussenwirtschaft* 1, pp. 7–46; Wunsch-Vincent, *supra* note 64.

<sup>146</sup> In the broader context of digital trade, next to these classification uncertainties, there are a number of other unresolved issues. There is for instance no clear confirmation on the application of Article VI GATS on domestic regulation, no determination of 'likeness' for application of MFN and national treatment commitments, which puts technological neutrality on a shaky ground, and no assertion so far whether electronically trade services fall under mode 1 or mode 2. For a comprehensive analysis, see Sacha Wunsch-Vincent, 'Trade Rules for the Digital Age' in Panizzon et al., *supra* note 56, pp. 497–529, at pp. 501–505.

<sup>147</sup> For some suggestions, see Catherine L. Mann and Sarah Cleeland Knight, 'Electronic Commerce in the WTO' in Jeffrey J. Schott (ed.), *The WTO after Seattle*, Washington, DC: Institute for International Economics, 2000, pp. 253–268, at p. 259; Wunsch-Vincent, *supra* note 64, at pp. 78–79; Tania Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS' (2007) *UCLA Entertainment Law Review* 14:1, pp. 1–32, at pp. 17–26.

The US particularly has put in substantial efforts to ensure implementation of its digital agenda<sup>148</sup> through FTAs since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore and the Central American countries<sup>149</sup> that contain only minimal restrictions for digital products (applying a negative scheduling approach)<sup>150</sup> and tackle some 'deep' e-commerce regulatory issues.<sup>151</sup>

Interestingly in this exercise, the US has shown deference to the culturally inspired measures of its FTA partners in the field of audiovisual services, provided that these measures are 'frozen' at their present level,<sup>152</sup> and as long as they relate to conventional 'offline' technologies only. As could be expected, the leeway given to the US partners with respect to trade in cultural products 'reflect[s] quite accurately the negotiating capacity of the states involved', so that 'as usual, the least able to protect themselves [...] end up paying the higher price'.<sup>153</sup>

The EC has in the meantime expanded the scope of application of its media regulation through the 2007 Audiovisual Media Services Directive (AVMS), which added on-demand audiovisual services to its regulatory field, signalling EC's desire 'to retain its competence to introduce culturally motivated measures across the electronic communications field and [...] not [to] accept the US "standstill" agenda' for digitally delivered products and services.<sup>154</sup> The AVMS includes notably also a soft-law rule, which creates an obligation for the Member States to ensure that media service providers under their jurisdiction '*promote*, where practicable and by appropriate means, production of and access to European works'.<sup>155</sup> On the bilateral and regional tracks, the EC has sought exclusion of cultural services from trade commitments (including content-related implications of e-commerce),<sup>156</sup> while promising intensified cultural co-operation without any sizeable concrete commitments.<sup>157</sup>

<sup>148</sup> On the digital trade agenda, its aims and approaches, see Wunsch-Vincent, *supra* note 145, in particular at pp. 11-12.

<sup>149</sup> The Central America FTA (CAFTA) includes Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. In 2004, the Dominican Republic joined the negotiations and the agreement is now known as the DR-CAFTA.

<sup>150</sup> For a detailed discussion of the US-Singapore and the US-Chile FTAs, see Wunsch-Vincent, *supra* note 145, at pp. 28-35. See also Martin Roy, Juan Marchetti and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements: How Much Further than the GATS?' (2006) WTO Economic Research and Statistics Division Staff Working Paper No 7, pp. 1-63, at pp. 38-40 (published in an updated version in Panizzon et al., *supra* note 56, pp. 77-110).

<sup>151</sup> For an analysis of these rules in selected FTAs, see Wunsch-Vincent, *supra* note 146, at pp. 516-523.

<sup>152</sup> Wunsch-Vincent, *supra* note 145, at pp. 15-16. See also Voon, *supra* note 147, at pp. 25-26.

<sup>153</sup> Bernier, *supra* note 64, at p. 15. Australia, as the most affluent of these states, managed to preserve existing quotas for commercial television and commercial radio. Singapore and Chile could also include relatively significant reservations, as did Costa Rica, the Dominican Republic and Morocco. On the other side, Guatemala, Honduras, El Salvador and Nicaragua left their audiovisual sectors in practice open to imports. See Bernier, *ibid.* at pp. 11-12.

<sup>154</sup> Craufurd Smith, *supra* note 4, at p. 49.

<sup>155</sup> Article 3(i)(1) AVMS (emphasis added). Such promotion could relate, *inter alia*, to the financial contribution to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes. Member States are to report every four years on the implementation of this provision, with a subsequent reporting obligation of the Commission to the Parliament and the Council, which should take into consideration the market, technological developments and the objective of cultural diversity. See Articles 3(i)(2) and 3(i)(3) AVMS.

<sup>156</sup> For an example, see EC-Chile Association Agreement (signed 3 October 2002), at Part IV 'Trade and Trade-related Matters'.

<sup>157</sup> See *ibid.* at Part III, Title II 'Culture, Education and Audio-visual', at Articles 38-40. For a relevant analysis of the Cariforum-EU Economic Partnership Agreement, see Nurse, *supra* note 18, at pp. 16-23.

#### 4. The WTO: The Devil Is Not So Black As He Is Painted

As Wouters and de Meester note, '[c]haracterising the WTO agreements as solely trade-oriented and therefore culture-insensitive is not fully deserved'.<sup>158</sup> Indeed, if one looks into the evolutionary path of the trade and culture quandary, it has been the General Agreement on Tariffs and Trade (GATT) 1947 that first<sup>159</sup> accommodated some cultural concerns in the context of international trade after the World War II when the older but much smaller European industries received state protection (mostly through import and screen quotas) against the incoming Hollywood supply.<sup>160</sup> Article IV GATT was the response to these policies and while prohibiting quantitative restrictions of imports<sup>161</sup> provided for some flexibility with regard to screening cinematograph films.<sup>162</sup>

Next to the leeway for screen quotas expressly devised in Article IV GATT, plenty of other norms scattered within the body of the WTO law<sup>163</sup> can be found relevant and allow certain flexibility as far as trade in cultural goods and services is concerned.<sup>164</sup> In particular, the General Agreement on Trade in Services (GATS) offers more wiggle room than the GATT,<sup>165</sup> since the GATS framework involves primarily a 'bottom-up' (or 'positive list') approach, whereby Members can choose the services sectors and sub-sectors in which they are willing to make national treatment or market access commitments, and can define the modalities of these commitments. In contrast, obligations under GATT regarding national treatment and quantitative restrictions apply across the board, subject to specified exceptions (a 'top-down' or 'negative list' approach).

<sup>158</sup> Wouters and De Meester, *supra* note 11, at p. 218.

<sup>159</sup> In the context of UNESCO, it was only in the 1990s that the organisation took a concrete interest in protecting cultural diversity from the alleged negative effects of international trade and economic globalisation. Key steps in this process were the publication of the seminal report 'Our Creative Diversity' by the World Commission on Culture and Development in 1995 and the 1998 Stockholm Conference on Cultural Policies for Development. For a detailed account, see Bernier, *supra* note 3 and Bruner, *supra* note 11, at pp. 378-383.

<sup>160</sup> The European industries were also to substantial degree destroyed by the wars. At the same time, Hollywood was flourishing and its productions, whose access to Europe was constrained due to the war, flooded the market after the war. See Bruner, *supra* note 11, at p. 367, referring to Hernan Galperin, 'Cultural Industries in the Age of Free-Trade Agreements' (1999) *Canadian Journal of Communication* 24:1, pp. 49-77, at p. 68. See also John Trumpbour, *Selling Hollywood to the World: US and European Struggles for Mastery of the Global Film Industry, 1920-1950*, Cambridge: Cambridge University Press, 2007.

<sup>161</sup> Article XI GATT.

<sup>162</sup> Article IV GATT covers 'internal quantitative regulations relating to exposed cinematograph films', which must take the form of 'screen quotas' conforming to certain requirements (Article IV, paras (a) to (d)). Such quotas 'may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized' (Article IV(a) GATT) and may 'reserve a minimum proportion of screen time for films of a specified origin other than that of the Member imposing such screen quotas' (Article IV(c) GATT). On Article IV GATT, see Rostam J. Neuwirth, 'The Cultural Industries and the Legacy of Article IV GATT: Rethinking the Relation of Culture and Trade in Light of the New WTO Round' (Paper presented at the Conference 'Cultural Traffic: Policy, Culture, and the New Technologies in the European Union and Canada', Carleton University, 22-23 November 2002). On the most infamous South-Korean screen quota system, see Won-Mog Choi, 'Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and Convention on Cultural Diversity' (2007) *Asian Journal of WTO & International Health Law and Policy* (AJWH) 2:2, pp. 267-286.

<sup>163</sup> The law of the WTO is contained in several agreements, attached as annexes to the WTO Agreement that encompass the General Agreement on Trade and Tariffs (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). We refer to these as the *WTO Agreements*. They are contained in Annex 1 of the WTO Agreement. Other Annexes organise additional aspects of liberalisation such as the dispute settlement procedure (Annex 2), trade policy review mechanism (Annex 3) and certain plurilateral agreements (Annex 4).

<sup>164</sup> For an overview of all relevant provisions, see Christoph Beat Graber, 'Audiovisual Media and the Law of the WTO' in Graber et al., *supra* note 3, at pp. 47-56.

<sup>165</sup> Graber, *supra* note 7, at pp. 555 and 569.



The existing scope for domestic measures regarding trade in culture was however never found sufficient.<sup>166</sup> The inner tension between trade and culture has always been there, even within the GATT 1947, as the WTO's less far-reaching institutional predecessor.<sup>167</sup> This tension exploded during the Uruguay Round (1986-1994), when France and Canada fought the 'exception culturelle' battle with the goal of exempting cultural services (in particular audiovisual ones) from the newly created agreement on services.<sup>168</sup> The infamous 'Agreement to Disagree' was a sort of a ceasefire (whereby GATS covers all services sector but permits commitment flexibilities).<sup>169</sup> However, it did not provide a real solution and cultural proponents were well aware of this. The further liberalisation commitment<sup>170</sup> was impending and the MFN exemptions made were at least theoretically limited in time.<sup>171</sup> A particularly unpleasant blow to cultural exception backers was the *Canada-Periodicals* case,<sup>172</sup> decided by the Panel and the Appellate Body to the benefit of the US and despite the fact that the Canada-US Free Trade Agreement (CUSFTA)<sup>173</sup> envisaged a cultural exception clause.<sup>174</sup>

Numerous proposals have been advanced before and after the adoption of the UNESCO Convention to solve the 'culture *versus* trade' conundrum and make it more like 'culture *and* trade'. One could group these suggestions (without claims for an exhaustive listing) into three categories.

(i) The first attempts the insertion of a link that will connect the law of the WTO to the UNESCO Convention (in a way more advantageous than Article 20 presently does), so that it would ultimately be for the WTO Panels and the Appellate Body to resolve the conflict and somehow reconcile the underlying incompatible values. One proposition in this context is to introduce a 'cultural' exception in the text of the WTO Agreements, similar to the ones existing for

<sup>166</sup> See e.g. Sandrine Cahn and Daniel Schimmel, 'The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS? (1997) Cardozo Arts and Entertainment Law Journal 15, pp. 281-314, at pp. 287-289.

<sup>167</sup> See e.g. GATT, *EEC-Directive on Transfrontier Television: Response to Request for Consultations under Article XXVII:1 by the United States*, DS4/4, 8 November 1989. Later WTO cases worth mentioning are WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Consultations by the United States*, WT/DS43/1, 17 June 1996; WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Establishment of a Panel by the United States*, WT/DS43/2, 10 January 1997; and *Canada-Periodicals*, supra note 50. For an overview, see Hahn, supra note 11, at pp. 528-530.

<sup>168</sup> See Christoph Beat Graber, 'Audio-visual Policy: The Stumbling Block of Trade Liberalisation' in Damien Geradin and David Luff (eds.), *The WTO and Global Convergence in Telecommunications and Audiovisual Services*, Cambridge: Cambridge University Press, 2004, pp. 165-214 Roy, supra note 83.

<sup>169</sup> See Bruner, supra note 11, p. 374; Galt, supra note 9, at p. 914; Cahn and Schimmel, supra note 166, at pp. 291-301.

<sup>170</sup> See Part IV GATS. Article XIX therein states: 'In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization'.

<sup>171</sup> The GATS Annex on Article II Exemptions states (at para 6) that, '[i]n principle, such exemptions [to MFN] should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds'. The exemptions made should have thus theoretically expired in 2005.

<sup>172</sup> See supra note 167.

<sup>173</sup> Canada-US Free Trade Agreement, 22 December 1987-2 January 1988, 27 ILM 281 (1988).

<sup>174</sup> In CUSFTA, the culture exception was coupled with a retaliation provision. Article 2005 CUSFTA provides that, '[c]ultural industries are exempt from the provisions of this Agreement', but also that either party could 'take measures of equivalent commercial effect in response to [such] actions'. The North American Free Trade Agreement (NAFTA; 17 December 1992, 32 ILM 289 (1993)) incorporated by reference CUSFTA this cultural exception. It exists only as between Canada and both the US and Mexico, but not between the US and Mexico. In practice, this provision comforting the Canadian cultural sector had little effect. See Cahn and Schimmel, supra note 166, at p. 30.

accommodating health or environmental concerns.<sup>175</sup> Another suggestion has been to amend the text of the preamble of the WTO Agreement and include the goal of cultural diversity next to that of sustainable development. This would arguably allow a Panel or the Appellate Body to interpret contested trade measures having the overarching objective of cultural diversity in mind, thereby balancing the interests at stake in the concrete conflict.<sup>176</sup> Another option within this category, sketched by Graber, is the creation of a procedural link between the WTO and the UNESCO rules, possibly through a Ministerial Decision,<sup>177</sup> which ‘would oblige Members, in cases of conflict between trade and culture, to take into account the UNESCO Convention when interpreting and applying WTO law or entering into negotiations leading to an amendment of the WTO framework’.<sup>178</sup> It is also conceivable that each Member could introduce a reference to the UNESCO Convention into its schedule of commitments, expressly stating in the relevant market access and national treatment columns that the limitations thereof are consistent with the UNESCO Convention. It is argued that this incorporation of the Convention by reference into the WTO law could allow it to be invoked, even *vis-à-vis* Members not Parties to the UNESCO Convention.<sup>179</sup>

Next to the obvious difficulty of negotiating and adopting all these proposals, is the concern as to whether the WTO adjudicating bodies are the appropriate ones to decide upon such critically important conflicts and whether they can really offer a solution that is comprehensive enough.<sup>180</sup> This is a particularly valid doubt considering the UNESCO Convention’s vagueness, as we exposed it above. Another, more general question also pertinent in this context, is whether such regime extensions are beneficial (to both trade and cultural regimes), since as Fiona Macmillan notes, ‘WTO is not an appropriate body to oversee the protection of human rights, nor of rights relating to cultural diversity and self-determination’.<sup>181</sup>

<sup>175</sup> See Article XX(b) GATT and Article XIV(b) GATS with regard to measures ‘necessary to protect human, animal or plant life or health’, and Article XX(g) GATT with regard to measures ‘relating to the conservation of exhaustible natural resources’.

<sup>176</sup> In *US–Shrimp*, the Appellate Body criticised the Panel’s decision stating, among other things, that ‘the Panel failed to recognise that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement. Thus, while the first clause of the preamble to the WTO Agreement calls for the expansion of trade in goods and services, this same clause also recognises that international trade and economic relations under the WTO Agreement should allow for ‘optimal use of the world’s resources in accordance with the objective of sustainable development’, and should seek ‘to protect and preserve the environment’’. See WTO Appellate Body Report, *US–Shrimp*, supra note 54, at para 17. See also paras 129–31, 152 and 155.

<sup>177</sup> If the decision is of a nature that would not alter the rights and obligations of the Members, it would take effect for all Members upon acceptance by two thirds of the Members, pursuant to Article X(4) WTO Agreement.

<sup>178</sup> Graber, supra note 7, at p. 572.

<sup>179</sup> Laura Gomez Bustos and Pierre Sauvé, ‘A Tale of Two Solitudes? Assessing the Effects of the UNESCO Convention on Cultural Diversity on WTO Law’ (Paper presented at the Conference ‘The New Agenda for International Trade Relations as the Doha Round Draws to an End’, University of Barcelona, 29–30 January 2007, on file with the author), at p. 50, referring to an interview with Hélène Ruiz-Fabri, UMR de Droit Comparé, Paris, 12 June 2006.

<sup>180</sup> ‘... the foundational concepts of trade regulation, intellectual property protection and cultural diversity are so far removed from each other, in their perceptions of basic ideas such as culture, markets and rights, that substantive conflict is inevitable, if not upon the surface, then at a deeper level. That in the exceptional circumstances of overt conflict, a lawyerly solution may be found, is no remedy for the potentially disruptive – or at least non-constructive – effects of the parallel existence of such inherently different normative regulatory systems’. Broude, supra note 121, at p. 363.

<sup>181</sup> Fiona Macmillan, ‘Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of Relationship’ in Graber and Burri-Nenova, supra note 91, pp. 73–95, at p. 90, referring also to Fiona Macmillan, ‘International Economic Law and Public International Law: Strangers in the Night’ (2004) *International Trade Law and Regulation* 10, pp. 115–124.

(ii) Similarly to the first group of suggestions, the second tries to introduce changes to diverse provisions of the WTO law or to insert new ones, so that it would itself be made more culture-sensitive, i.e. allowing Members to pursue diverse cultural policy measures, including those that would otherwise collide with the existing multilateral trade rules. In this context, a waiver for cultural policies negotiated under Article IX:3-4 of the WTO Agreement is the most radical of options. It is also the least likely to materialise since a waiver demands first a clear identification of the sector(s) concerned and second, the support of three-quarters of the WTO membership.<sup>182</sup> Other, subtler proposals put forward are in essence various types of cultural exemptions – not in the sense of a wide ‘exception culturelle’ as France and Canada defined it during the Uruguay Round<sup>183</sup> – but differentiated and justified by distinct (and presumably objective) characteristics inherent to cultural products and services. Bernier has suggested, for instance, an exception ‘for the preservation of cultural and linguistic diversity, including national cultures’,<sup>184</sup> while Graber more concretely argues in favour of a cultural exemption restricted to the protection of arthouse films.<sup>185</sup>

However, as Voon quite rightly notes, all these proposals, besides the obvious difficulty of formulating them in a non-arbitrary and enforceable manner and of obtaining the Members’ consent, are ‘regressive’ in that they decrease the already achieved level of liberalisation, especially where GATT is concerned.<sup>186</sup> Moreover, essentially all of these suggestions are just ‘academic’ projects and not real politically driven ones that find the support of WTO Members.<sup>187</sup> In fact, as the UNESCO Convention clearly shows the search of ‘trade and culture’ solutions within the WTO has largely been given up. States are happy with maintaining their low level of commitments (especially in audiovisual services) and find the escape to the forum of UNESCO as a security in this regard.<sup>188</sup>

<sup>182</sup> For a detailed analysis of a waiver proposal, see Chi Carmody, ‘When ‘Cultural Identity Was Not an Issue’: Thinking about *Canada–Certain Measures Concerning Periodicals*’ (1999) *Law and Policy in International Business* 30, pp. 231-320.

<sup>183</sup> For an account of the different positions, see Roy, *supra* note 83, at pp. 926-928.

<sup>184</sup> Ivan Bernier, ‘Cultural Goods and Services in International Trade Law’ in Dennis Browne (ed.), *The Culture/Trade Quandary*, Ottawa: Centre for Trade Policy and Law, 1998, at p. 147.

<sup>185</sup> See Christoph Beat Graber, ‘WTO: A Threat to European Film?’ in Enrique Banus (ed.), *Proceedings of the Vth Conference ‘European Culture’*, Pamplona: University of Navarra, 2000, pp. 865-878. Graber suggests that such arthouse films could be differentiated, instead of using otherwise subjective qualitative assessment, by applying a quantitative criterion for film budgets of not more than 5 million USD (see Graber, *supra* note 70, at pp. 332 and 336).

<sup>186</sup> Voon, *supra* note 147, at p. 27.

<sup>187</sup> A bold solution to the audiovisual services quandary ‘outside the box’ has been outlined by Tania Voon, who suggests ‘a holistic approach to audiovisual products in the WTO, taking a holistic view of GATT and GATS rather than seeing them as two separate and independent agreements’. Voon argues for an overhaul of the existing minimum level of commitments and maximum level of MFN exemptions for audiovisual services. She advocates full commitments for both market access and national treatments, believing that, ‘[t]rade restrictions in the form of market access limitations should not be allowed on the grounds that they are necessary to preserve or promote culture’. Considering the radical nature of this proposal, Voon reflects upon possible ‘escape routes’ for Members. In this context, she sees a necessity for new rules on subsidies, on preferential treatment of developing countries and redesigning the screen quota rule (in the sense of agreeing that a measure that complies with Article IV GATT would not be regarded as violating GATS and introducing similar rules for radio and television broadcasting). See Voon, *supra* note 147, at pp. 20-26.

<sup>188</sup> Craufurd Smith notes in this context: ‘Arguably, the Convention was never intended by its promoters to be an innovative measure; it was primarily designed to maintain the status quo in the field of trade and culture. In particular, developed countries such as Canada and France promoted the Convention on the basis that it would provide high level political endorsement for their culturally motivated trade restrictions. It serves to justify not only their existing measures but also their refusal to make commitments in new and developing communications sectors in the future’. See Craufurd Smith, *supra* note 4, at pp. 53-54 (footnote omitted).

Against this backdrop, it is perhaps 'healthier' to consider options that are not so 'culturally-coloured'.

(iii) In this sense, the third category of suggestions we look at, envisages amendments to a number of WTO law norms or the introduction of new ones that improve the law of the WTO to reflect more appropriately the changes in the contemporary global space, to be clearer, more transparent and enforceable. By undergoing this 'renovation' process, it is also likely that norms will be put in place that allow simultaneous advancement of trade liberalisation goals and consideration of public interests and values of importance to Members and to the international community (including cultural diversity).

In view of the changing media environment, an important avenue for improving the WTO framework could be the reform of the existing services classification. Classification and scheduling issues have long been acknowledged as problematic since the classification system used for services<sup>189</sup> (the W/120<sup>190</sup> with reference to the United Nations Central Product Classification (CPC)<sup>191</sup>) is rather inconsistent with the purpose of scheduling, is not detailed enough, has overlapping and/or outdated categories, and has not always been followed by the Members. A clearer, better-structured and up-to-date classification, especially with regard to the sectors pertinent to culture and the rapidly changing audiovisual and telecommunications areas,<sup>192</sup> can be put high on the list of desiderata, especially after *US-Gambling*.<sup>193</sup> Such an improved system could, most importantly in the present context, allow finer-tuned scheduling rather than the existing 'all-or-nothing' approach.<sup>194</sup> It can also facilitate deeper market access commitments not only in the services sectors (such as computer and telecommunications services<sup>195</sup>), where this may reasonably be expected.

Achieving a level of legal certainty with regard to classification may also contribute to solving the dilemma of classifying digitally transferred products and services, as described above. At this stage, even if all parties agree that the GATS modus is the appropriate one for digital content, it is unclear which service category would apply: online games, for instance, could be fitted into computer and related services, value-added telecommunications services, entertainment or

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<sup>189</sup> The classification problem is similar for goods and the applied Harmonised System, created and regularly amended by the World Customs Organization. See Dayong Yu, 'The Harmonised System – Amendments and Their Impact on WTO Members' Schedules' (2008) WTO Economic Research and Statistics Division Staff Working Paper No 2, pp. 1-23.

<sup>190</sup> See supra note 80.

<sup>191</sup> UN Provisional Central Product Classification (CPC), UN Statistical Papers, Series M, No 77, Ver.1.1, E.91.XVII.7, 1991.

<sup>192</sup> For details on audiovisual services, see Roy, supra note 83, at pp. 947-949; for telecommunications services, see Burri-Nenova, supra note 81.

<sup>193</sup> The need for careful scheduling has been stressed by the *US-Gambling* rulings (supra note 145). This may also have a chilling effect as Members will be particularly careful to accept commitments considering that they extend to services electronically supplied across borders (see Sacha Wunsch-Vincent, 'The Internet, Cross-border Trade in Services, and the GATS: Lessons from *US-Gambling*' (2006) World Trade Review 5, pp. pp. 319-355, at p. 324) and that there is a presumption that the structure and language of a schedule follow the W/120 and CPC nomenclature (see Markus Krajewski, 'Playing by the Rules of the Game? Specific Commitments after *US-Gambling and Betting* and the Current GATS Negotiations' (2005) Legal Issues of Economic Integration 32:4, pp. 417-447, at p. 427).

<sup>194</sup> Roy, supra note 83, at p. 947.

<sup>195</sup> Wunsch-Vincent, supra note 145, at p. 25.

audiovisual services.<sup>196</sup> This is also true for other new and emerging services, which were not available at the time the GATS was negotiated.<sup>197</sup>

As a more comprehensive improvement plan, there is a good deal to be achieved in taking up the unfinished business of the Uruguay Round. The 'framework of GATS rules and disciplines is still very much under construction'<sup>198</sup> and next to the progressive liberalisation through more and deeper commitments (Article XIX GATS), the GATS structure needs to be completed with rules on: (i) emergency safeguard measures (Article X:1); (ii) subsidies (Article XV:1); (iii) government procurement (Article XIII:2); and (iv) domestic regulation (Article VI:4).<sup>199</sup>

While all of these projects<sup>200</sup> would make the rules of the GATS finer-grained, thereby allowing also better tuned commitments,<sup>201</sup> new rules on subsidies<sup>202</sup> are to be viewed as particularly appropriate in the context of 'trade and culture'. The audiovisual sector is one of the traditionally subsidised ones<sup>203</sup> and 'often subsidies are the most efficient instrument for pursuing noneconomic objectives',<sup>204</sup> possibly also for the protection and promotion of local or national culture. Furthermore, the US has noted in this respect that, 'Members may also want to consider developing an understanding on subsidies that will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture',<sup>205</sup> so there may be some tolerance already.

Yet, aware of the little progress made so far towards creating horizontally applicable rules on subsidies, the lack of data and most importantly, 'decidedly limited political appetite for forward movement',<sup>206</sup> it seems apt to argue in favour of elaborating a limited number of *ad hoc* instruments.<sup>207</sup> This is the approach also

<sup>196</sup> Wunsch-Vincent, *supra* note 64, at p. 71.

<sup>197</sup> The CPC has in fact been amended twice since the end of the Uruguay Round (see Central Product Classification – Version 1.0, UN Statistical Papers, Series M, No 77, 1998, E.98.XVII.5 and Central Product Classification – Version 1.1, UN Statistical Papers, Series M, No 77, 2002, ESA/STAT/SERM/77/Ver.1.1. The CPC Version 2 is in draft and pending adoption). The new versions of the CPC contain a number of previously not existing information technology services. See Wunsch-Vincent, *supra* note 146, at p. 502.

<sup>198</sup> Pierre Sauvé, 'Completing the GATS Framework: Addressing Uruguay Round Leftovers' (2002) *Aussenwirtschaft* 3, pp. 301-341, at p. 302.

<sup>199</sup> *Ibid.* at pp. 302-303.

<sup>200</sup> For an analysis of these undertaking, see Sauvé, *ibid.*, as well as Pierre Sauvé, 'Been There, Not Yet Done That: Lessons and Challenges in Services Trade' in Panizzon et al., *supra* note 56, pp. 599-631.

<sup>201</sup> We noted above that GATS allows substantially more flexibility than the GATT. It should however be borne in mind that if Members do make unlimited commitments under GATS, they may in fact be more restricted than under GATT since within the fairly new construct of the agreement on services no rules on subsidies, safeguards or an equivalent to GATT Article IV for screen quotas exist. See Voon, *supra* note 147, at pp. 5-6 and Sauvé, *supra* note 198, at pp. 327-333.

<sup>202</sup> While the current GATS framework contains no specific rules on subsidies, subsidies are not excluded from GATS' scope of application. As 'measures by Members affecting trade in services' within the meaning of Article I:1, subsidies are fully covered by the provisions of the GATS. There are a number of GATS provisions that restrict governments' ability to provide services subsidies or to offer a remedy to those Members harmed by their negative effects. See Pietro Poretti, 'Waiting for Godot: Subsidy Disciplines in Services Trade' in Panizzon et al., *supra* note 56, pp. 466-488.

<sup>203</sup> Sauvé, *supra* note 198, at p. 325.

<sup>204</sup> Bernard Hoekman, 'Toward a More Balanced and Comprehensive Services Agreement' in Schott, *supra* note 147, pp. 119-135, at p. 129.

<sup>205</sup> WTO, Communication from the United States, Audiovisual and Related Services, S/CSS/W/21, 18 December 2000, at para 10(iii). The US has already accepted some leeway for subsidies in its FTAs with Singapore and Australia.

<sup>206</sup> Sauvé, *supra* note 198, at p. 332, referring also to Pierre Sauvé and Christopher Wilkie, 'Investment Liberalisation in GATS' in Pierre Sauvé and Robert M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalisation*, Washington, DC: Brookings Institution Press, 2000, pp. 331-363.

<sup>207</sup> Poretti, *supra* note 202, at p. 486.

followed by Tania Voon,<sup>208</sup> who advocates allowing ‘a limited exception for Members to impose discriminatory cultural policy measures in the form of subsidies in preference to any other form’.<sup>209</sup> Voon argues for a narrow definition of subsidies similar to that for goods in the Agreement on Subsidies and Countervailing Measures,<sup>210</sup> and for allowing both *de jure* (based on the origin of the service or service supplier) and *de facto* (based on objective and transparent cultural criteria such as language) discrimination in the granting of subsidies.<sup>211</sup>

Finally, in the third category of suggestions, one needs to mention the possibility of inserting competition rules within the WTO legal framework<sup>212</sup> that would cater for market distortions by private undertakings.<sup>213</sup> Such rules could be particularly helpful considering that digital media are by default global in their distribution and new media providers operate regardless of borders. This is however perhaps the least feasible of avenues accounting for the little progress made since Singapore<sup>214</sup> and that the issue was dropped from the Doha agenda.<sup>215</sup>

To sum up, while the WTO Agreements have been generally held not to provide sufficient flexibilities and be capable of accommodating cultural policy measures, there are various ways in which this could be remedied. Unfortunately, the over-politicised disconnect of regulatory issues of trade and culture renders all these suggestions mere ‘brain games’, highly unlikely of ever being realised. Within these proposals, however, there are also such, which are not in themselves culturally motivated but rather seek to improve the overall WTO structure of rules (in particular of the GATS) making it more flexible, comprehensive and transparent. Using these ‘neutral’ paths, such as improved classification or new rules on subsidies for services, may allow simultaneous framing of both economic and public interest rationales.

Unlike the framework of rules, institutions and procedures created by the UNESCO Convention, the WTO Agreements offer more legal certainty, better ensure fairness and enforceability, and contain mechanisms for evolutionary development through negotiation and adjudication. In this sense, one could argue that, although their focus is not on issues of culture, the WTO Agreements can very well cater for the ‘trade and culture’ ones.

<sup>208</sup> Voon, *supra* note 147, at pp. 20-24.

<sup>209</sup> *Ibid.* at p. 20.

<sup>210</sup> WTO, Agreement on Subsidies and Countervailing Measures, at Article 1.1(a)(i) and (ii).

<sup>211</sup> Voon, *supra* note 147, at p. 22. Messerlin and Cocq propose a ‘reference paper’ on audiovisual subsidies allowing ‘subsidies for cultural reasons, while banning subsidies for mere industrial reasons’ (see Emmanuel Cocq and Patrick Messerlin, ‘French Audio-Visual Policy: Impact and Compatibility with Trade Negotiations’ in Guerrieri et al., *supra* note 3, at pp. 48-49).

<sup>212</sup> Philip Marsden, *A Competition Policy for the WTO*, London: Cameron May, 2003; Merit E. Janow, ‘Trade and Competition Policy’ in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer, *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. 3, New York: Springer, 2005, pp. 487-510.

<sup>213</sup> See Germann, *supra* note 95, at p. 111; Graber, *supra* note 185, at pp. 327-328, 343.

<sup>214</sup> WTO, Singapore Ministerial Declaration, Conf. Doc. WT/MIN(96)/DEC/W, 13 December 1996. The Singapore Declaration (at para 20) mandated the establishment of ‘a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework’.

<sup>215</sup> WTO, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004, at para (g).

## 5. Conclusions: Back to the Future

The case of ‘trade *versus* culture’ becomes very attractive for politicians as the popularity of globalisation wanes, in particular in industrialised countries<sup>216</sup> and as national values and interests, especially after the 9/11, gain prominence.<sup>217</sup> Yet, the politically driven disconnect between trade and culture, while easily justified before the respective constituencies, is not necessarily beneficial for either the domain of trade or that of culture. The relationship between the two is somehow natural and indeed it has been explicitly recognised by the UNESCO Convention that cultural goods and services have *dual* nature and constitute on the one hand, commodities that can be traded and are ‘vehicles of identity, values and meaning’,<sup>218</sup> on the other.

A politically laden and increasingly widening gap between issues of trade and culture may be unfortunate, we hold, and may substantially reduce the chances of creating coherent regulatory models, which are trade-conducive while sufficiently accommodating public interest objectives. This hypothesis is not only a critique of the current approaches but also relates to our premise that a ‘trade *versus* culture’ confrontation does not reflect the practical reality of contemporary cultural content creation, distribution and consumption. We argued that the digital networked environment, which has now become pervasive, has radically altered the dynamics of cultural content markets, as well as the conditions for creativity and innovation, and may call for a re-evaluation of the policy tools for the attainment of cultural diversity. We suggested in particular that any trade restriction may in fact be counterproductive to a thriving cultural environment, and that the focus on ‘trade *versus* culture’, especially in the classical discussion of audiovisual media services, may be too narrow and failing to recognise the augmented significance of other regulatory domains (such as copyright).

We also and at times harshly criticised the UNESCO Convention, which in its present form, can be construed as ‘little more than an extension of the [Uruguay Round’s] “Agreement to Disagree”’,<sup>219</sup> although framed under the auspices of a new forum. As ‘trade in cultural products continues to grow, the Convention [...] is counterintuitive at best and completely off the mark at worst’.<sup>220</sup> In contrast, we held that there are various ways in which the WTO could become more conducive to cultural considerations. The path dependencies relating to audiovisual services and anything to do with culture (and by simplified extension, with national sovereignty<sup>221</sup>) are however too strong to allow any forward movement at this stage. Using ways that are not necessarily ‘cultural’ on their face may be (at least

<sup>216</sup> The Warwick Commission Report, *supra* note 68, at p. 19 and chapter 1.

<sup>217</sup> For a critique of the cultural exception doctrine, see Galt, *supra* note 9, at pp. 915-922.

<sup>218</sup> Article 1(g) of the UNESCO Convention.

<sup>219</sup> Galt, *supra* note 9, at p. 933.

<sup>220</sup> Singh, *supra* note 76, at p. 48.

<sup>221</sup> Interestingly in this context, both the United States and Australia, presented the FTA and its rules on media as a victory to their constituents. The USTR claimed that, ‘[i]n broadcasting and audiovisual services, the FTA contains important and unprecedented provisions to improve market access for US films and television programs over a variety of media including cable, satellite, and the Internet’ (see USTR, US-Australia Free Trade Agreement: Brief Summary of the Agreement, Fact sheet, 18 May 2004). In contrast, Australia’s Department of Foreign Affairs and Trade stated that, ‘[t]he Government has protected our right to ensure local content on Australian media, and retains the capacity to regulate new and emerging media, including digital and interactive TV. The agreement ensures that there can be Australian voices and stories on audiovisual and broadcasting services, now and in the future’ (see Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement: Key Outcomes, available at [http://www.dfat.gov.au/trade/negotiations/us\\_fta/outcomes/02\\_key\\_outcomes](http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/02_key_outcomes); last accessed 25 January 2009).

partially) a solution to this problem, although being aware of the complexity of the negotiation process, we do not fantasise that there is soon to be a substantial advancement in any of the discussed aspects.

The profoundly changed (and changing) media landscape may offer an opportunity to rethink the old 'analogue' audiovisual media rules and the wider context of 'trade and culture'. In this process, there is no urgency to negotiate or draw borders – these are by nature fuzzy (and could even get fuzzier as the notion of cultural diversity evolves and societies get more heterogeneous in themselves and homogenous between them). Policy- and rule-makers will have to live with this. As national regulators start to grapple with digital media and their regulatory implications, we are also likely to observe the emergence of new tools that instead of merely reserving some 'shelf-space' for domestic productions, foster creativity, interactivity, distribution and re-use of information.<sup>222</sup> The new regulatory models would call for readjustment of the international commitments of these states and perhaps press on for some changes within the WTO.

As Galt prognosticates, '... consumer sovereignty, technological change, and perhaps another dominant voice within the European Union will prove too powerful to keep in check. The collective hand of EU negotiators will be forced to make further concessions and jumpstart GATS negotiations in the audiovisual sector, perhaps extracting valuable concessions from the United States in other sectors. However, if the "trade and culture" linkage is not squarely addressed soon, the European Union may find itself in a position whereby its concessions in the audiovisual sector are of little value at the negotiating table',<sup>223</sup> especially if we bear in mind that the US has already found comfortable solutions for digital media trade in its FTAs.

Pressure upon the 'cultural exception' exponents is also likely to be exerted from developing countries, who may not be satisfied with the cultural cooperation promises under the UNESCO Convention,<sup>224</sup> and actively search for real market access concessions. Such an aspiration would not be misplaced, since 'even a cursory look at international trade in cultural products shows' that, 'developed countries at the forefront of efforts to "protect" cultural diversity are at the forefront of cultural trade as well [and] developing countries as a whole, band-wagoning on the protections wagon, in fear of losing out from such trade, are actually gaining increased shares, even though they remain marginal'.<sup>225</sup>

Speculating about the longer term dimension of the relationship between trade and culture, we may very well expect a 'return' to the WTO framework but also

<sup>222</sup> The British Broadcasting Company (BBC) has already experimented in this field. See Ofcom, *A New Approach to Public Service Content in the Digital Media Age: The Potential Role of Public Service Publisher*, Ofcom Discussion Paper, 24 January 2007. See also Jamie Cowling and Damien Tambini (eds.), *From Public Service Broadcasting to Public Service Communications*, London: Institute for Public Policy Research, 2004.

<sup>223</sup> Galt, *supra* note 9, at p. 935, meaning the United Kingdom as the new dominant voice within the EU and referring to Des Freedman, 'Trade *versus* Culture: An Evaluation of the Impact of Current GATS Negotiations on Audio-Visual Industries', 2002.

<sup>224</sup> See Articles 14, 16 and 18 of the UNESCO Convention. Many developing countries have ratified the Convention in the hope that they would profit from the International Fund for Cultural Diversity, created under the UNESCO Convention (Article 18).

<sup>225</sup> Singh, *supra* note 76, at p. 42. See also the data exemplifying this statement, at pp. 43-45. Though sympathetic with the goal of cultural diversity, the United Nations Conference on Trade and Development (UNCTAD) also noted that 'from the trade and development point of view, protectionism should not be encouraged in the name of culture'. See UNESCO, Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, Presentation of Comments and Amendments, Part IV: Comments Proposed by the IGOs, UNESCO Doc. CLT/CPD/2004/CONF.607/1, 14-17 December 2004, at p. 7.



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new domestic regulatory initiatives that address new problems that the digital networked environment brings about.